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CONTENTS

THE THIRTY-THIRD YEAR OF THE WORLD COURT. *Manley O. Hudson* 1

CODIFICATION AND DEVELOPMENT OF INTERNATIONAL LAW. *H. Lauterpacht* 26

EDITORIAL COMMENT:

Robert H. Jackson. *William W. Bishop, Jr.* 30

Charles Warren. *Lester H. Woolsey* 50

Collective Security and the London Agreements. *C. G. Fenwick* 52

Enemy Property. *Philip C. Jessup* 57

Peace and War: Factual Continuum with Multiple Legal Consequences. *Myres S. McDougal* 63

Identity of States under International Law. *Josef L. Kunz* 65

NOTES AND COMMENTS:

Arthur K. Kuhn a Patron of the Society. *E. H. F.* 71

49th Annual Meeting of the Society. *E. H. F.* 77

International Law Association. *Clyde Eagleton* 82

46th Session of the Institute of International Law. *Kaarel R. Pusta, Sr.* 83

Fourth International Congress of Comparative Law. *R. R. W.* 85

Survey of Research in Progress on the Middle East. *W. W. B.* 87

Prizes in International Organization. *E. H. F.* 85

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. *Oliver J. Lissitzyn* 83

BOOK REVIEWS AND NOTES:

Guggenheim, *Traité de Droit International Public*, Vols. I and II, 105; de Visscher, *Théories et Réalités en Droit International Public*, 106; Mukherjee, *International Law Redefined*, 108; Calvez, *Droit International et Souveraineté en U. R. S. S.*, 109; Herrero y Rubio, *Historia del Derecho de Gentes*, 111; McNair, *The Law of the Air*, 112; Ford, *The Anglo-Iranian Oil Dispute of 1951-1952*, 112; Appleman, *Military Tribunals and International Crimes*, 114; *Foreign Relations of the United States, 1936*, Vols. I-V, 115; Bind-schedler, *Rechtsfragen der Europäischen Einigung*, 117; Schloebauer, *Die Idee des Ewigen Friedens*, 118.

Books Received 119

PERIODICAL LITERATURE OF INTERNATIONAL LAW 121

SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)

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THE THIRTY-THIRD

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The history of the Inter is contained in narrow co rendered by the Court in *Rome in 1913*, and to th *Effect of Awards Made* Apart from these, in the 1 mola, the time for the re one month, to November that the "*Electricité de* list at the request of the two cases brought by th

Union, relating to the *Treatment in Hungary of Aircraft and Crew* United States of America, should be removed from the list for lack of jurisdiction. Elections held in the General Assembly and the Security Council assured the Court of a full complement of judges. Three individual states took action during the year with respect to their declarations recognizing the Court's compulsory jurisdiction.

CASE OF THE MONETARY GOLD REMOVED FROM ROME IN 1943

This case arose from an application by the Italian Government against the Governments of the French Republic, the United Kingdom, and the United States of America, filed on May 19, 1953. The application was treated in the ordinary way, and time limits were set for the filing of a memorial by the Italian Government and counter-memorials by the respondent governments.¹

On October 30, 1953, the Agent of the Italian Government filed with the Court a document entitled "Preliminary Question"; this pointed out that the application invited the Court to pronounce upon the international responsibility of Albania to Italy, and that doubts might arise as to its jurisdiction. The document therefore contained a submission, by which the Italian Government

requests the Court to adjudicate upon the preliminary question of its jurisdiction to deal with the merits of its claim, set forth under No. 1 of the submissions of the Application submitted to the Court on May 9th, 1953.

In an Agreement signed at Washington on April 25, 1954, the governments of the French Republic, the United Kingdom, and the United States of America, who were charged with the restitution of monetary

* This is the thirty-third in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ I.C.J. Reports, 1953, p. 37.

American Journal of International Law

Vol-49

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Jan. - Oct.

1955

gold under Part III of the Agreement on Reparation from Germany signed in Paris on January 14, 1946,² agreed upon the arbitration of the question of the ownership of 2338.7565 kilograms of monetary gold seized in Rome by the Germans in 1943 and taken to Germany. Both Albania and Italy laid claim to the gold, as being the property of the National Bank of Albania; the National Bank of Albania was an Italian enterprise set up in 1925, whose assets were nationalized by an Albanian law of January 13, 1945. It was anticipated that Albania might win the arbitration, and in this event the parties to the Agreement said in an accompanying statement that they would deliver the gold to the United Kingdom in partial satisfaction of the judgment in the *Corfu Channel Case*, delivered by the Court on December 15, 1949,³

unless, within 90 days from the date of the communication of the arbitrator's opinion to Italy and Albania, either

(a) Albania makes an application to the International Court of Justice for the determination of the question whether it is proper that the gold, to which Albania has established a claim under Part III, should be delivered to the United Kingdom in partial satisfaction of the *Corfu Channel* judgment; or

(b) Italy makes an application to the International Court of Justice for the determination of the question whether, by reason of any right which she claims to possess as a result of the Albanian law of 13th January 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania and agrees to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise.⁴

In either event the three governments accepted the jurisdiction of the Court.

Mr. Georges Sauser-Hall was appointed as the arbitrator in the case; he held on February 20, 1953, that the gold was the property of Albania in 1943. The Albanian Government made no application to the Court as provided in the Washington Statement; but such an application was filed by the Italian Government on May 19, 1953, instituting proceedings against the governments of the French Republic, the United Kingdom, and the United States of America.⁵

² Treaties and Other International Acts Series, No. 1655; [British] Treaty Series, No. 56 (1947), Cmd. 7173.

³ I.C.J. Reports, 1949, pp. 244, 250. The amount of compensation due from the People's Republic of Albania to the United Kingdom was fixed at £343,947. See this JOURNAL, Vol. 44 (1950), p. 579.

⁴ The text of the Washington Agreement of April 25, 1951, is to be found in 91 United Nations Treaty Series 21; Treaties and Other International Acts Series, No. 2252; and [British] Treaty Series, No. 39 (1951), Cmd. 8242. The text of the attached Statement appears in Department of State Bulletin, Vol. 24 (1951), p. 785. In this case it matters little that the three governments parties to the Agreement were agreed to go before the Court, and the question of the importance of the Agreement as furnishing a basis for the Italian Application really disappears; the Court at no time considered the text of the Agreement.

⁵ The text of the application does not appear in the Court's judgment; it is full of interest for the student. The facts of the case seem to be set out with considerable

The application was transmitted by the Registry to the three respondent governments on May 19, 1953, and to the Albanian Government on May 20, 1953—it is not clear why this date was chosen for the transmission to Albania. By an order of July 1, 1953, time limits were fixed for the presentation of the memorial and counter-memorials; the former was fixed for November 2, 1953.⁶

On October 30, 1953, the preliminary question was submitted to the Court by the Agent of the Italian Government; on November 3, 1953, the Court issued an order suspending the proceedings on the merits and fixing two time limits for the proceedings;⁷ the order was later extended.⁸ So far as the preliminary question was concerned, the case became ready for hearing on March 31, 1954.

In the absence of Judge Alvarez, the Court consisted of all the judges plus Professor M. G. Gaetano Morelli, Professor of International Law of the University of Rome. Oral hearings were begun on May 10, 1954, and were concluded on May 14, 1954. The Court heard arguments and replies by MM. Casto Caruso and Tomaso Perassi on behalf of Italy, and on behalf of the respondent governments by MM. André Gros and Philippe Monod, for France, and by Sir Gerald Fitzmaurice and Mr. J. E. S. Fawcett for the United Kingdom.⁹

In the final submissions of the Italian Government, the Court was asked to adjudge and declare

That the Statement to accompany publication of the Agreement between the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America for the submission to an arbitrator of certain claims with respect to gold looted by the Germans from Rome in 1943 is not a sufficient basis upon which to found the jurisdiction of the Court to deal with the merits of the claim set forth under No. 1 of the Submissions of the Application submitted to the Court by the Government of the Italian Republic on May 19th, 1953;

That the Court is consequently without jurisdiction to adjudicate upon the merits of the said claim;

That the Court, whatever may be its decision on the question of jurisdiction referred to above, is without jurisdiction to adjudicate upon the claims contained in No. 1 and No. 2 of the Submissions of the Government of the United Kingdom dated March 26th, 1954.

At the hearing on May 14, 1954, the British Government asked the Court to say

(1) That, in view of Italy's objection on the ground of the alleged lack of competence of the Court, her Application to the Court of May 19th, 1953,

particularity, and it bears on the fullness of the Italian case. Apart from this fact, the application does not deal directly with the two questions which were before the Court in the present proceeding.

⁶ *Ibid.*, p. 44.

⁷ I.C.J. Reports, 1953, p. 37.

⁸ I.C.J. Reports, 1954, p. 10.

⁹ Mr. Herman Phleger, Agent of the Government of the United States, stated that since he did not expect to supplement his written statement, he would not be present at the oral proceedings.

(a) does not conform to the conditions and intentions of the Tripartite Washington Statement of April 25th, 1951, or *alternatively*

(b) has been in effect withdrawn or cancelled by Italy, and is therefore invalid and void;

(2) that Italy is, in the circumstances, to be deemed not to have made any application to the Court within the meaning and for the purposes of the Tripartite Washington Statement.

Alternatively

(3) that, if the Court holds, contrary to the contentions of the United Kingdom, that the Italian Application is still valid and subsisting, the Court has jurisdiction to determine on their merits the questions put to the Court in the Italian Application.

Judgment was given by the Court on June 15, 1954.¹⁰

The Court begins by tracing the origin of the case in Part III of the Paris Agreement on Reparation from Germany, of January 14, 1946. This Agreement provided that monetary gold should be pooled for distribution as restitution among the states from which the gold was looted by Germany; and its implementation was entrusted to the respondent governments, which set up a Tripartite Commission for the purpose. The participation of Italy in this distribution, a question expressly reserved in the 1946 Agreement, was made possible by a Protocol signed with Italy by the French, British, and United States governments at London on December 16, 1947.¹¹ "Disputed questions of law and fact" having arisen in respect of the gold taken from Rome, the Washington Agreement was signed on April 25, 1951, by which the matter was submitted to arbitration; the arbitrator gave his opinion that the gold in question had belonged in 1943 to Albania, within the meaning of Part III of the Paris Agreement. This was the only question submitted to the arbitrator. The respondent governments had declared in the Statement issued on the date of the Washington Agreement of 1951 that they were faced with "another question," since Italy and the United Kingdom claimed the gold for different reasons not covered by Part III of the Agreement. Italy had not presented a memorial on the merits; instead she raised an issue as to the Court's jurisdiction to deal with the first claim in her application.

It is this question which the Court terms a "preliminary question." In the practice of the Court, it is a new thing to be called a preliminary question. Italy's submission was really directed against Albania, which was not a party to the dispute, and the Court was asked to say whether the Washington Statement was "a sufficient basis on which to found the jurisdiction of the Court to deal with the merits of the claim set forth under No. 1 of the submissions of the Application."

The Court was really confronted with a dispute between Italy and the United Kingdom, as the French Republic and the United States of America did not go beyond general observations. The United Kingdom Government had based its challenge to the Court's jurisdiction on the ground that it

¹⁰ I.C.J. Reports, 1954, p. 19; digested in this JOURNAL, Vol. 48 (1954), p. 649.

¹¹ Treaties and Other International Acts Series, No. 1707; [British] Treaty Series, No. 3. (1948), Cmd. 7298.

- (a) does not conform to the conditions and intentions of the Tripartite Washington Statement of April 25, 1951; or *alternatively*
(b) has been in effect withdrawn or cancelled by Italy and is therefore invalid and void.

In other words, Italy was to be deemed "not to have made any application to the Court within the meaning and for the purposes of the Tripartite Washington Statement."

In the first place, it was argued that the "preliminary objection" of Italy was contrary to the Rules or to the Statute. Article 62 of the Rules is couched in terms which do not limit to the respondent the right to present preliminary objections; in other words, the article does not preclude the raising of an objection by an applicant in circumstances such as those in which the present case has arisen. The Court found that Italy's acceptance of jurisdiction had not become less complete or less positive than was contemplated in the Washington Statement.

Nor could the Court accept the British contention that the application had been in effect withdrawn or canceled. The raising of a preliminary objection by Italy could not be regarded as a discontinuance of the case, in accordance with Article 69 of the Rules.

The Court noted that in respect of the relations between the three respondent states and Italy the application was in conformity with the offer made in the Washington Statement. The governments before the Court had made by successive acts a submission to the Court within the meaning of Article 36 (1) of the Statute. The Court drew attention to a British argument in the oral proceedings which would have confined the question to a statement whether Albania's share would go to the United Kingdom or to Italy. This seemed to be an oversimplification of the problem. The Court had been requested first to determine certain legal questions upon the solution of which depended the delivery of the gold.

The first submission of the Italian Government centered upon a claim against Albania for an alleged wrong. It was obvious that the Court could not decide on the merits of such a question in the absence of Albania. The Court could only exercise jurisdiction over a state with its consent, and that consent was lacking in the case of Albania. In the present case, Albania's legal interests would be affected by a decision; in fact they would form the subject-matter of the decision. No provision of the Statute would justify such a decision of the Court. Under Article 59 of the Statute, the decision of the Court in a given case binds only the parties to it and only in respect of the particular case, but there underlies that provision the assumption that the Court is at least able to render a binding decision.

As to the second claim in the Italian application, the question of priority as between Italy and the United Kingdom had always been a subsidiary question. It referred to a right which existed in the Italian Government independently of Great Britain. The right referred to would only arise in the event that the Court had decided on the merits of the first question. Counsel for the Italian Government had added, however, that

if the Court considers that the question of priority between the respective rights of the United Kingdom and Italy can be examined in a hypothetical form, independently of the examination of the first Italian claim, the Italian Government, for its part, would have no objection.

Apart from the fact that this statement was conditional in form, it could not constitute a proposition based on the Washington Statement. Hence the Court found that it was impossible for it to adjudicate on the Italian claim.

On the first point, the jurisdiction conferred did not, in the absence of Albania, authorize it to adjudicate. By thirteen votes to one, the Court found that it could not adjudicate upon the second submission in the Italian application. Having adjudicated on the first issue in the case, the Court did not feel called upon to adjudicate upon the second issue. Judge Levi Carneiro dissented from the finding that the second submission was not within the competence of the Court.

EFFECT OF AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

This was a proceeding for an advisory opinion of the Court. It had its origin in a resolution which was adopted by the General Assembly on December 9, 1953, and filed in the Registry of the Court on December 21, 1953.¹² On December 24, 1953, the resolution of the General Assembly was communicated to all states entitled to appear before the Court; on January 14, 1954, it was communicated to the states which were members of the International Labor Organization.

The following availed themselves of the privilege of presenting a written statement to the Court: the International Labor Organization, and the governments of France, Sweden, The Netherlands, Greece, the United Kingdom, the United States of America, the Philippines, Mexico, Chile, Iraq, the Republic of China, Guatemala, Turkey, and Ecuador. The governments of Canada, the Soviet Union, Yugoslavia, Czechoslovakia, and Egypt referred to the views expressed by their representatives in the General Assembly. The Secretary General of the United Nations presented a written statement and transmitted several documents to the Court.

The oral proceedings were held from June 10 to 14, 1954, and the Court heard statements by Mr. C. A. Stavropoulos on behalf of the Secretary General, Mr. Herman Phleger for the United States, Professor Paul Reuter for France, M. Jean Spiropoulos for Greece, Sir Reginald Manningham-Buller for the United Kingdom, and Mr. A. J. P. Tammes for The Netherlands.

The text of the resolution is as follows:

The General Assembly,
Considering the request for a supplementary appropriation of
\$179,420, made by the Secretary-General in his report (A/2534) for

¹² Resolution 785 (VIII) A of Dec. 9, 1953. General Assembly, 8th Sess., Official Records, Supp. No. 17 (A/2630), p. 41.

the purpose of covering the awards made by the United Nations Administrative Tribunal in eleven cases numbered 26; and 37 to 46 inclusive.

Considering the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions contained in its twenty-fourth report to the eighth session of the General Assembly (A/2580),

Considering, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation,

Decides

To submit the following legal questions to the International Court of Justice for an advisory opinion:

(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?

The opinion was given on July 13, 1954.¹³ It was reached by nine votes to three; two of the three dissenting judges will cease to hold office on February 5, 1955.

The first question submitted to the Court was strictly limited in scope. It concerned only awards made within the limits of the competence of the Tribunal, as determined by Article 2 of the Statute. Hence the Court did not regard itself as requested to express its view with regard to an award which exceeds the scope of that statutory competence. In the circumstances the Court regarded the first question submitted to it as contemplating awards made by a properly constituted tribunal. The first question was further limited to awards which grant compensation to a staff member; it related solely to awards in favor of staff members whose contracts of service had been terminated without their assent. The Court was asked to say whether the General Assembly is legally entitled—has a legal right—to refuse to give effect to such awards. The first question was general and abstract. The answer depended on the provisions of the Statute of the Tribunal as adopted by the General Assembly on November 24, 1949, and on the Staff Regulations and Rules as enforced on December 9, 1953; but the Court would take account of the amendments made to the Statute on the latter date.

Article 2 (3) of the Statute says that “in the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.” Article 10 of the Statute provides that the judgments shall be final and without appeal, and that they shall state the reasons on which they are based. These provisions are of an essentially judicial character; they conform with rules properly laid down in statutes or laws for courts of justice. The Statute of the Tribunal contains no

¹³ I.C.J. Reports, 1954, p. 47; digested in this JOURNAL, Vol. 48 (1954), p. 655.

was dated February 16, 1954, and was filed with the Registry on March 3, 1954; the same applies to the application against the Soviet Government. The Government of the United States expressed a wish that the two applications should be considered and dealt with together. Both applications were duly communicated to the Hungarian Minister for Foreign Affairs and the Soviet Ambassador to The Netherlands, to all Members of the United Nations through the Secretary General, and to all other states entitled to appear before the Court.

The United States founded its position on the capacity of the governments to submit to the jurisdiction of the Court in this matter, and on Article 36 (1) of the Statute. The question of the jurisdiction to be conferred on the Court has no importance in this case, because it was not conferred; the Soviet Government declined to submit the case to the Court in a letter dated April 30, 1954, received in the Registry on May 3, 1954, and the Hungarian Government took the same action on June 14, 1954. The reference to Article 36 (1) of the Statute was only an attempt of the United States to avail itself of an expression of hope with respect to the function of the Court.

In this situation, the Court had nothing to do but issue orders that the cases be removed from the list.¹⁵

"ÉLECTRICITÉ DE BEYROUTH" COMPANY CASE

This case was instituted by an application of the French Government of August 14, 1953. The French Government filed its memorial within the time limit fixed,¹⁶ by January 18, 1954. April 8, 1954, was originally designated as the date for the filing of the Lebanese counter-memorial, but this was extended to July 28, 1954.¹⁷ On July 17, 1954, the Agent of the Lebanese Government informed the Registry that the French Government would discontinue the case; on July 26, 1954, the Registry was informed that the Government of the French Republic was not going on with the proceedings. Hence the Court found it unnecessary to fix a time limit according to Article 69 (2). In these circumstances, the Court placed on record the discontinuance by the French Government, and ordered the case removed from the list.¹⁸

CASE PENDING FOR 1955

Only one case is pending on the list of the Court, i.e., the *Nottebohm Case* instituted by an application filed in the Registry on December 17, 1951, by the Government of the Principality of Liechtenstein against the Government of Guatemala. On May 8, 1954, the Court fixed July 17, 1954, as the time limit for the filing of the reply of the Government of Liechtenstein and October 2, 1954, as that for the rejoinder of Guatemala.¹⁹ The last action in the case was on September 13, 1954, when the time limit for the

¹⁵ I.C.J. Reports, 1954, pp. 99, 103.

¹⁶ I.C.J. Reports, 1953, p. 41.

¹⁷ I.C.J. Reports, 1954, p. 13.

¹⁸ *Ibid.*, p. 107.

¹⁹ *Ibid.*, p. 16.

filing of the rejoinder of the Government of Guatemala was extended from October 2 to November 2, 1954.²⁰

PROGRESS AS TO COMPULSORY JURISDICTION

During the year, several states have continued their previous recognition of the Court's compulsory jurisdiction, thus giving evidence of their desire to see the Court made generally available.

On February 6, 1954, Australia canceled its declaration of August 21/23, 1940, which had grown slightly out-of-date, and substituted a new declaration. In the new declaration, there are several paragraphs applying to the continental shelf, as to which disputes are not to go before the Court without a *modus vivendi* of the parties.

On May 24, 1954, Honduras renewed its declaration of February 10, 1948; the new declaration applies for a period of six years, renewable by tacit reconduction.

By a letter received in the Secretariat on June 8, 1954, the representative of Turkey announced that in accordance with Act No. 6357 of the Grand National Assembly of Turkey of March 10, 1954, the declaration of May 22, 1947, originally effective until May 22, 1952, was extended for a further period of five years from May 22, 1952.

ACCEPTANCE OF THE STATUTE BY JAPAN AND SAN MARINO

On December 3 and 9, 1953, the Security Council and the General Assembly replied to questions put by Japan and San Marino as to the conditions upon which they might become parties to the Statute of the Court.²¹ On February 18, 1954, San Marino accepted the conditions and deposited its Declaration of January 18, 1954, with the Secretary General of the United Nations. On April 2, 1954, Japan accepted the conditions and deposited its Declaration of March 25, 1954, with the Secretary General of the United Nations. Thus San Marino and Japan followed the course of Switzerland and Liechtenstein.

The two states were invited to take part in the election of the judges, but only Japan took such a rôle.

ELECTION OF JUDGES IN 1954

Two elections of judges were held in 1954. First, there was the election of a successor to Judge Sir Benegal Narsing Rau; and second, the election of successors to the five judges whose terms were due to expire in Febru-

²⁰ *Ibid.*, p. 110. [This paragraph was prepared before the publication of the request for advisory opinion adopted by the General Assembly on November 23, 1954; as it was reproduced in the request for an advisory opinion, it was headed "voting procedure on questions relating to reports and petitions concerning the territory of South-west Africa."]

²¹ Resolutions 805 (VIII) and 806 (VIII) of Dec. 9, 1953. General Assembly, 8th Sess., Official Records, Supp. No. 17 (A/2630), pp. 54, 55.

Justice Jackson largely succeeded in obtaining agreement on the principles for which he stood. He deserves much credit for the success of that conference in overcoming wide differences between the substantive and procedural legal ideas of divergent national systems, and in obtaining agreement both upon a fair judicial procedure and the law to be applied by the Tribunal. Through patient merging of the principles of the legal systems concerned, a procedure was developed which caused remarkably little trouble and which has generally been regarded as fair to the accused. His opening statement for the prosecution on November 21, 1945, set the pattern for much of the thinking of the trial. He served skillfully in the detailed prosecution, and his report to the President on October 7, 1946,⁶ and various addresses since have well summarized his views and evaluation of the whole endeavor.

Seeking to explore the thinking behind Nürnberg, we observe that Justice Jackson had great faith in the "existing and indestructible reality"⁷ of international law and the hope which it offered as a "foundation on which the future may build."⁸ Even in the dark days of early 1941 he wrote that "the structure of international law, however apparently shaken, is one of the most valuable assets of our civilization."⁹ He added that "Lodged deeply in the culture of the world, unaffected by the transitory political structures above it, is a bedrock belief in a system of higher law."¹⁰

By the time of his Havana address of March 27, 1941,¹¹ Robert Jackson had already expressed the ideas underlying the change of American policy from traditional neutrality to Lend-Lease and "all aid short of war." Discrimination between the belligerents was justified on the illegality of Hitler's resort to war in violation of the Kellogg-Briand Treaty for the Renunciation of War, as well as upon the notion of collective self-defense. Speaking of this treaty and the Argentine Anti-War Treaty, he said at Havana that they

rendered unlawful wars undertaken in violation of their provisions. In consequence, these treaties destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories the duty of discriminating against an aggressor, but it conferred upon them the right to act in that manner.¹²

Showing the thinking which later prevailed at Nürnberg, he concluded:

To me, such an interpretation of international law is not only proper but necessary if it is not to be a boon to the lawless and the aggressive. A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-

⁶ *Ibid.*, at p. 432.

⁷ *Loc. cit.* (above, footnote 4), at p. 11.

⁸ Jackson, "Challenge of International Lawlessness," *Am. Bar Assn. Journal*, Vol. 27 (1941), p. 690.

⁹ Address before Inter-American Bar Association at Havana, March 27, 1941, this *JOURNAL*, Vol. 35 (1941), p. 348, at p. 349.

¹⁰ *Loc. cit.* (above, footnote 8).

¹¹ See footnote 9 above.

¹² *Ibid.*, at p. 354.

defeating and would not help even a little to realize mankind's hope for enduring peace.¹³

While various others had urged that Nazi leaders be tried for the crime of aggressive war as well as for violations of the laws of warfare, Justice Jackson emphasized this approach. As he saw it, the facts clearly established the guilt of the Nazi leaders in this respect, and he based the legal conclusions on Germany's violation of the Kellogg-Briand Pact as well as other treaties into which Germany had freely entered:

Unless this Pact altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception.¹⁴

The Tribunal was to adopt his reasoning as to the legal effect of this treaty, and to agree that it

constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime.¹⁵

Repeatedly he emphasized that the charge of aggressive war was being used not to make criminal those acts which were otherwise lawful, but to deprive the violators of the excuse that their acts were done in lawful war:

Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught.¹⁶

He had little patience with the contention that the trial of these Nazi leaders for planning, initiating and waging aggressive war would result in *ex post facto* application of criminal law. He believed that such acts had already become criminal by 1939 when they were committed, and that even assuming that they had not, yet the prohibition of *ex post facto* laws was not an absolute but a principle which should be used to attain just results. On various occasions he stated:

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has the right to initiate customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by the normal processes of legislation for there is no continuing inter-

¹³ *Ibid.*, at p. 358.

¹⁵ *Ibid.*

¹⁴ *Op. cit.* (footnote 2 above), at p. 52.

¹⁶ *Ibid.*, at p. 51.

as well face the fact that it will not be enough to have a mechanism for keeping the peace which a few scholars and statesmen think well of. If it is really to work, it must have such widespread acceptance and confidence that peoples as well as philosophers support it as a thoroughly honorable and reasonably hopeful alternative to war.²⁹

Doubtful of the utility of codification of international law until the world had many more shared experiences and values in dealing with international disputes by legal means,³⁰ he felt that:

we should take advantage of every opportunity to deal with international controversies by the adjudicative or arbitral techniques. In this way we will enlarge and expand the world's experience in using these orderly and reasonable processes, fashion an increasing body of decisional and customary international law, and encourage the law-abiding habit among nations.³¹

There may be room for much difference of opinion as to the validity of some of the views expressed by Mr. Justice Jackson, but in the main they are sound and necessary for making real progress in international law. He was only too aware that the lasting value of the Nürnberg principles will depend far less on the ready acceptance given them by the United Nations General Assembly than on the use made of them in the future. Most of us will agree with his belief that:

Those who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace.³²

WM. W. BISHOP, JR.

CHARLES WARREN

Charles Warren was born March 9, 1868, and died August 16, 1954, at his home in Washington at the age of 86. A native Bostonian of pure Colonial ancestry, a graduate of Harvard, a student at the Harvard Law School for two years (obtaining a degree of A.M.), Mr. Warren came to be early marked as an author and historian. His career may be divided roughly into several more or less distinct phases. During the first phase up to 1914, while he was engaged in the practice of law in Boston, he tried his hand at a novel, *The Girl and the Governor* (1900), and a poem delivered at the dedication of the Harvard Union in 1901. But his penchant for historical writing was by that time distinctly budding. Besides various legal papers and historical notes in current law reviews, he published a two-volume work on *The Harvard Law School and Early Legal Conditions in America* (1909), and *A History of the American Bar, Colonial and Federal, to the Year 1860* (1911).¹

²⁹ Address of April 13, 1945, *loc. cit.* (footnote 4 above), at p. 12.

³⁰ Address before American Society of International Law, April 26, 1952. Proceedings, 1952, p. 196, at p. 201. See also footnote 27 above.

³¹ *Loc. cit.* (footnote 19 above), at p. 158.

³² Address of April 13, 1945, *loc. cit.* (footnote 4 above), at p. 11.

¹ The writer is indebted to the kindness of Mrs. Cleada N. Horne, Mr. Warren's secretary for over 35 years, for making available certain data for this paper.

A second phase, which might be called the "War and Neutrality" phase, from his appointment as Assistant Attorney General of the United States to about 1920, covers his incumbency in the Department of Justice and the war period. In this phase he was charged with enforcing our neutrality laws and obligations and prosecuting the hostile activities of belligerent agents in the United States, and his writings naturally grew out of official duties. As he found there had been practically no neutrality legislation since 1838 and but a few criminal laws appropriate to curbing these activities, he drafted, by direction of the Attorney General, 18 protective laws which were submitted by the latter to Congress in June, 1916, but were not presently enacted. After the United States entered the war, many of these provisions were incorporated in the so-called Espionage Act of June 15, 1917, which was really a neutrality law, and in the Sabotage Act of 1918. He was also instrumental (in connection with the Department of State) in drafting the Trading With the Enemy Act of July 6, 1917, which was largely based on the British enactments.

In 1915, soon after he came to Washington, Mr. Warren joined this Society and ever since had been a loyal and helpful member. He sat on the Executive Council and various committees, participated in the annual meetings, and was made an Honorary Vice President in 1936. His remarks and comments in the discussions of legal questions were penetrating and ranged over a broad field, but had particular reference to the law of war and neutrality. His only contribution in this period to the JOURNAL was a review of Huberich's book on *Trading With the Enemy* (1918), which he praised highly as describing the new policy of the United States for the treatment of enemy property, namely, conscripting it to fight the adversary while conserving it in safe investment.

Now came the third and crowning phase of his career from 1920 to 1932. This was the flowering period of his work. His great and abiding love was the history of the Constitution of the United States as interpreted by the United States Supreme Court. Fortunately, he had the time and circumstance to devote himself to his chosen field. He was a profound scholar and a meticulous historian as well as an interesting writer. These all combined in this period to produce the great works which made him famous. The chief work was *The Supreme Court in the History of the United States* (three volumes, 1922, rev. 2 volumes 1926), which won the Pulitzer Prize for History in 1923, and established him a secure and enviable reputation as an authority on the Constitution and the Supreme Court. It was regarded as the best account of the Court's part in maintaining the Constitution and in shaping the destiny of the growing nation. With unbelievable patience and industry he examined the contemporary newspapers, correspondence, manuscripts, documents and histories of the time in order to determine the influences surrounding the Court and the public reaction to its important decisions. It has been cited many times as authority in the decisions of the Court. The first words in the Preface are: "This is not a law book. It is a narrative of a section of our national history connected with the Supreme Court and is written for laymen and

- lawyers alike." It is an effort "to revivify the important cases and to picture the Court itself from year to year in its contemporary setting."

This work was followed in 1925 by *Congress, the Constitution, and the Supreme Court* (rev. 1935), which was really a supplement to the former work. Here the author depicts the efforts of Congress to break out of the straight-jacket imposed by the Constitution and its guardian, the Supreme Court. Then in 1928 came *The Making of the Constitution* (rev. 1937), in which the author takes the reader day by day through the proceedings of the Constitutional Convention during the hot months of 1787. From the debates set down in Madison's Notes and later comments of the various delegates, he made a running account of what went on in the Convention, the conflicts of views and the underlying reasons for each provision adopted.

Then honors fell about him on all sides. The Supreme Court appointed him special master to hold hearings in the cases of *New Mexico v. Texas* (1924), *Utah v. United States* (1929), *Texas v. New Mexico* (1936). President Roosevelt appointed him the American member of the Arbitral Tribunal in the Trail Smelter case between the United States and Canada, 1929, and the American member of the Conciliation Commission between the United States and Hungary, 1939. Columbia University gave him an honorary LL.D. in 1933. He was elected to the Harvard Board of Overseers 1934 (like his father and great-great-grandfather) and President of the Harvard Alumni Association, 1941.

The fourth phase, from about 1933 to 1936, when a second war threatened Europe, was a flareback to the second phase in World War I and signified his earnest attempts to keep the United States out of the coming conflagration by restricting the area of conflict with belligerents over so-called neutral rights. This is his most fruitful period in the annals of this Society. Having been in the Government in World War I, he naturally formed definite ideas about the neutral attitude of the United States in a future war. Out of this experience came his first paper before the Society entitled "What are the Rights of Neutrals Now, in Practice?" (1933). The theme was that, however the legal rights of neutrals stood in 1914, there had been nothing done to clear up the contest over them in the last war on account of the innovations of modern warfare: "There are no rules or laws of naval warfare affecting neutral trade as to which the Great Powers are in agreement."

In view of this doubtful status of neutral rights, Mr. Warren, in an article in *Foreign Affairs* (April, 1934) on the "Troubles of a Neutral," advocated that something should be done to avoid another embroilment over neutral rights. Among other things, he contended in substance that the President should, at the outset of war negotiate with the belligerents a *modus vivendi* of concessions for neutral trade, or failing this, he had various alternatives of which one was to declare that neutrals have no rights, another was not to irritate the belligerents by pressing violations of neutral rights until the conclusion of the war.

His first article in the JOURNAL was entitled "Belligerent Aircraft, Neutral Trade and Unpreparedness" (1935). In this he deplored the

fact that little or nothing had been written by jurists on the problems of neutral trade in the light of armed merchantmen, submarines or aircraft, and that no effective action had been taken by nations to settle these legal questions which were sure to irritate relations of neutrals and belligerents in the future. At the same time, he proposed in a letter to the *Washington Post* of April 26, 1935, a series of nine suggestions as to what should be done to fill the gap. These ranged from an international agreement on neutral trade to the prohibition of the export of contraband goods unless title be vested first in the foreign purchaser.

As a result of his crusade to keep the United States out of the next war then brewing in Europe and of the discussion thereby aroused, he was asked by the State Department to prepare a memorandum on neutrality. Many of Mr. Warren's suggested restrictions on so-called neutral rights (such as export of munitions on a cash-and-carry basis, travel of Americans on belligerent vessels, arming of American merchant vessels, financial transactions with belligerents, and so forth) were incorporated in the series of Neutrality Laws enacted in 1935, 1936, 1937, and 1939. But not until November 17, 1941, when war had become a reality in Europe and Pearl Harbor was in the making, were the restrictions of the law of 1939 modified at the insistence of President Roosevelt, and our lot was again thrown in with the Allies.

Sandwiched in the above papers were other contributions, too numerous to mention, on neutrality questions before other organizations, even as late as 1940. And a further digression occurred in 1943 when, in the proceedings of the Society dealing with the punishment of war criminals and in subsequent letters to the *New York Times*, Mr. Warren strongly urged that the officers of a state guilty of the barbarous crimes against civilization in Europe were not entitled to trial by a court, they already were conclusively proven guilty, and their punishment should be treated as a pure question of policy and expediency to be handled by executive action of the victors, just as the Powers had treated Napoleon.

The final phase of Mr. Warren's life and work was a sort of miscellany screened from the labors of earlier years and the reflections of mellowing age. As by-products came materials for numerous articles, lectures and addresses at universities, Bar Associations, and other bodies in many States. Hardly a year went by that he was not invited to give a course of lectures or deliver an address or prepare a paper. Space does not allow a review of these excursions in legal history, but one can hardly pick up a copy at random (like "The Trumpeters of the Constitution" delivered at the University of Rochester) and read it without a thrill of patriotism at the events portrayed and of admiration for the writer who could breathe life into the dust of history. His last book was *Odd By-Ways in American History* (1941), recounting some of the "picturesque and unusual episodes" in American history between 1778 and 1840 wherein "we seemed to have slipped for one lawless moment out of the iron rule of cause and effect." And finally there came, surprisingly, a long poem called "Paraphrase of Job's Dark Days" (1941).

- Charles Warren may be appraised not only by his intellectual attainments, but by his high principles of character. One could not but be impressed by his intellectual honesty and his steadfast search for the truth—the “Veritas” of his beloved Alma Mater. Indeed, his innate sense of fairness caused him to present both sides of a controversial question. Although he was endowed with a creative imagination, yet there was a strain of solid practicality running through his nature which kept him aloof from the pitfalls of speculation and sophism. And in his strength of conviction he stood up for views, whether his own or another’s, which his acute mind had sifted and found free of dross. Underneath all ran a vein of subtle humor which enlivened his writings and his friendships. Now his clear voice in the pathways of history is still, but the pathways he trod he left forever adorned and endeared.

L. H. WOOLSEY

COLLECTIVE SECURITY AND THE LONDON AGREEMENTS

At the close of the first World War the words “collective security,” “collective responsibility for the maintenance of peace” were words of high hope for the establishment of law and order in a world of states which had hitherto resisted any effective restraints upon their sovereign right to have recourse to war to enforce claims they believed to be just. The principle underlying collective security was simple enough: that the combined forces of the law-abiding states would be so formidable that no state that might otherwise be tempted to defy the law would dare to challenge them. The possibility of organizing the collective forces of the law-abiding states was, perhaps, too easily taken for granted; although under the conditions of the time, with the movement of troops as slow as it then was, there was reason to believe that the formidable array of reserved military strength possessed by the law-abiding states would make it clear to a possible aggressor that it could not hope to win its war in the end. All that was needed was unity among the leading Members of the League of Nations; and these were counted upon to be law-abiding. The participation of the United States in the system was, indeed, important; but even without that, it appeared possible to make it work.

Much the same hope existed when the Charter of the United Nations was signed at San Francisco on June 26, 1945. But this time the machinery of collective security was made more effective, both in respect to decisions in regard to acts of aggression and in respect to combined military action for the enforcement of the law. The assumption of unity on the part of the permanent members of the Security Council, however, soon proved to be unfounded; but even the unforeseen break between East and West might not have proved fatal to the principle of collective security had not the invention of the atomic bomb introduced a new instrument of warfare so devastating in its effects as to give an almost overwhelming advantage to a surprise attack. Hence the need for the organization of defense by alliances and regional groups in which there would be no veto of the Soviet Union, and immediate action could be taken for self-defense under Article 51 of the Charter.

The first of the regional groups was that of the twenty-one American states, which signed their regional security agreement at Rio de Janeiro on September 2, 1947, under the title, "Inter-American Treaty of Reciprocal Assistance."¹ This treaty, however, can scarcely be said to be a recognition of the failure of the system of collective defense under the Charter of the United Nations, inasmuch as it had been planned before the San Francisco Conference and was directed to the maintenance of the inter-American system without reference to any specific situation that might arise among the leading Members of the United Nations. The following year, however, the Brussels Treaty was signed with the direct objective of collective defense against the threat of further Russian aggression following the *coup d'etat* in Czechoslovakia;² and again a year later, on April 4, 1949, the North Atlantic Treaty was signed by twelve states, including the United States, pledging themselves to "maintain and develop their individual and collective capacity to resist armed attack."³ Implementing the treaty is an elaborate series of commands and committees under the name of North Atlantic Treaty Organization, whose permanent military headquarters (SHAPE) control and direct an integrated defense force under a centralized command.

But the necessity was soon realized of going beyond an integrated defense force of separate national armies if German co-operation in the defense of Western Europe was not to give rise to fears of a new German menace. Hence the plan of a European Army in which the units contributed by each member would lose their national identity and come under the command of a single political authority. But the European Defense Community, as it was called, went beyond mere military defense. The European Coal and Steel Community had taken the first step towards a federation of European nations; the Defense Community now proclaimed the establishment of a new regional group that was to be "supra-national in character," that was to have "common institutions" as well as common armed forces—a community that was to have juridical personality and be represented by a Council of Ministers, a Common Assembly, and a Court of Justice, institutions looking towards "an ultimate federal or confederal structure."⁴

High hopes were aroused on all sides that the long-sought European Union might now at last be realized, and that beginning with defense the Defense Community might go on to establish those political and economic bonds which might disarm the rivalries of centuries, and not only remove the fear of future conflict, but set an example to the Communist world that peace and material prosperity could be attained without the sacrifice of liberty. But unhappily it proved more difficult than was anticipated to allay the suspicion and distrust that still conditioned the reaction of the

¹ Pan American Union, Congress and Conference Series, No. 53; this JOURNAL, Supp., Vol. 43 (1949), p. 53.

² Great Britain, Foreign Office, Misc. No. 2 (1948), Cmd. 7367; this JOURNAL, Supp., Vol. 43 (1949), p. 59.

³ Department of State Publication 3497; this JOURNAL, *loc. cit.*, p. 159.

⁴ See this JOURNAL, Vol. 46 (1952), p. 698.

French Chamber of Deputies, and on August 30, 1954, the hopes for the treaty came to an end when a vote in the Chamber refused to continue discussion of the plan.

The London Agreements of October 3, 1954, now come to replace the Defense Community Treaty, and there is every promise that, if they be duly ratified, the defense needs of Western Europe will be met by them, all the more so because this time the United Kingdom has agreed to participate in the maintenance of the armed forces of the nine-Power group. An interesting feature of the agreements is the manner in which they interlock with the earlier Brussels and North Atlantic treaties. The Brussels Treaty of 1948 is made "a more effective focus of European integration" by providing that the German Federal Republic is to be invited to accede to the treaty so that "the system of mutual automatic assistance in case of attack" will be extended to it. At the same time the Consultative Council of the Brussels Treaty will become a council with powers of decision, and the Brussels Treaty Organization will include an agency for the control of armaments of the continental members of the Organization, so that no one country will be able to dominate the combined forces. The United States representative, the Secretary of State, announced the willingness of the United States "to continue its support for European unity," and to this end he would "recommend to the President" the renewal of the assurance given in connection with the European Defense Community that the United States would continue to maintain in Europe the units of its armed forces "while a threat to the area exists." A similar statement was made by the representative of Great Britain, while the representative of Canada reaffirmed its resolve to continue its obligations under the North Atlantic Treaty Organization, which it was said, "remains the focal point of our participation in collective defense." The London Agreements further provide that the Federal Republic of Germany is to be admitted as a member of the North Atlantic Treaty Organization and that all the forces of the NATO countries stationed on the Continent shall be placed under the authority of the Supreme Allied Command, Europe (SACEUR).

On its part the Federal Republic of Germany accepts limitations upon its right to manufacture atomic, chemical or biological weapons and other forms of armament, and it agrees to supervision of the restrictions by the competent authority of the Brussels Treaty Organization. At the same time a special declaration by the German Federal Government, accompanied by a joint declaration by the governments of France, the United Kingdom and the United States, proclaims their determination to settle disputes by peaceful means, to refrain from the threat or the use of force in their international relations, and to give to the United Nations assistance in any action it may take in accordance with the Charter.⁵

Whether on the basis of the London Agreements the nine Powers may now be able to enter into negotiations with the Soviet Union so as to relieve the tensions that now exist remains to be seen. It was the hope of

⁵ For text of the Final Act of the Nine-Power Conference, see Department of State Bulletin, Oct. 11, 1954, and Publication No. 5659 entitled "London and Paris Agreements September-October 1954."

those who supported the European Defense Community that the example of closer federal ties among the members of the Community, with resulting material progress accompanied by respect for human rights and greater liberty of action, might influence the ring of satellite states and, it might be, even the separate races and peoples that constitute the Soviet Union. Perhaps the advance towards European Union may go forward more steadily now that the first step has been taken, even though it is a shorter step than was first contemplated.

C. G. FENWICK

ENEMY PROPERTY

It is a sound general proposition that the confiscation of private property of aliens is a breach of international law. The assertion of the generalization does not foreclose argument on the definition of "confiscation" or on the existence of conditions which justify an exception to the rule. The purpose of this comment is to discuss the question whether the presence of the condition that the alien owner of the property is an "enemy alien" justifies an exception, that is, makes confiscation lawful, and if lawful, whether confiscation is a wise policy.

The literature on the general issue of lawfulness of confiscating enemy alien property is abundant and generally familiar.¹ It is the writer's view that those who maintain that such confiscation is unlawful have the better of the argument, although recent decisions of the courts of the United States do not lend support to this view as did the opinion of Chief Justice Marshall.² Since customary international law reflects the practice of states and since that practice in the 20th century has been ambiguous, the issue deserves determination by an internationally authoritative judicial body.

In explaining the submission of applications to the International Court of Justice on March 3, 1954, instituting proceedings against the Soviet and Hungarian Governments on account of their conduct in connection with American airmen who came down on Hungarian soil in 1951, the Department of State declared that "in determining to bring this matter before the International Court of Justice," it had been "moved by the

¹ See the classic discussion by John Bassett Moore, *International Law and Some Current Illusions* (1924), pp. 13 ff.; O. C. Sommerich, "A Brief Against Confiscation," *Law and Contemporary Problems*, Vol. 11 (1945-1946), p. 152; and the numerous discussions, particularly by Professor Edwin Borchard, in this JOURNAL.

² "Unquestionably to wage war successfully the United States may confiscate enemy property." *Silesian-American Corporation v. Clark* (1947), 332 U. S. 429, 475, digested in this JOURNAL, Vol. 42 (1948), p. 473. Compare Chief Justice Marshall's views in *U. S. v. Percheman* (1833), 7 Peters 51, 86. Compare also the position of the American Bar Association in 1943: "Confiscation is contrary to the principles of law. It is contrary to our constitutional law principles and to the principles of international law." *Annual Report of the American Bar Association* (1943), p. 454. See also the conclusions in the Final Report of the Subcommittee to Examine and Review the Administration of the Trading with the Enemy Act of the Committee on the Judiciary, U. S. Senate (1954), p. 68: "The Committee feels that the record set forth in this report clearly indicates that the policy of confiscating the individual enemy's property located in the United States has been an unsound deviation from international law and the historic policy of the Government."

desirability of promoting the establishment and maintenance of the rule of international law and order."³ A signal demonstration of our devotion to the international rule of law would be provided by taking steps to secure a pronouncement by the International Court of Justice on the question of the lawfulness of the confiscation of enemy alien property. Such a pronouncement could be obtained either through raising the question in the General Assembly of the United Nations and securing the adoption of a resolution requesting an advisory opinion, or through the submission of a contested case in a friendly suit.⁴ It is suggested that it would be in the national interest of the United States to seek such an authoritative pronouncement. This suggestion requires an exposition of the present situation concerning the policy and practice of the United States with reference to enemy alien property during and after World War II.

Decisions concerning enemy alien property in World War II were naturally taken in the light of our practice and experience in World War I. It seems fair to say that the net result of United States practice in World War I supports at least the policy of non-confiscation, although 20% of the properties were actually not returned. It cannot yet be said that United States practice for the World War II period has been brought to an end. We have used the familiar device of an Alien Property Custodian. We made an agreement with our Allies at Paris in 1945 to the effect that enemy property shall be applied to reparation account.⁵ Secretary of State Dulles testified before a Senate subcommittee that this "Paris Agreement" could be interpreted as "not intended to operate in perpetuity but was designed as a temporary measure perhaps to assure against a revival of German militarism and the use of German important commercial assets possibly as an instrument of German militarism. I think that danger has passed. . . ."⁶ Congress has not yet acted on the Dirksen Bill (S. 3423) or other proposals which would provide for the return of the property to its owners, seeking elsewhere funds to satisfy American claimants.

So far as policy is concerned, we may fortunately at this time recognize that cyclical movement of policy toward an enemy which history has made familiar and to which Secretary Dulles called attention. During a war,

³ Department of State Bulletin, Vol. 30 (1954), p. 449.

⁴ For an indication that the general problem is already being considered by the governments of the United States and the Federal Republic of Germany in a friendly spirit, see the exchange of letters between President Eisenhower and Chancellor Adenauer, *ibid.*, Vol. 31 (1954), p. 269.

⁵ See John B. Howard, "The Paris Agreement on Reparations from Germany," *ibid.*, Vol. 14 (1946), pp. 1023 ff.

⁶ Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 83rd Cong., 2nd Sess., on S. 3423 to Amend the Trading with the Enemy Act [the Dirksen Bill] (1954), p. 161. The Secretary of State also testified that as an executive agreement, the Paris Agreement "was without authority whatever to bind the Congress of the United States in this matter." It is not clear whether the Secretary intended to say that in the light of international law the United States assumed no legal obligation under this agreement.

a state seeks to prevent its enemy from utilizing economic resources. This is proper.⁷ A belligerent state also naturally seeks to utilize to its own advantage enemy enterprises (including patents and going concerns) which are under its physical control. At the moment of victory, there is usually a determination that the enemy shall not be allowed to re-establish a military potential which includes its economic capabilities. However, the experience after 1920 showed the futility of attempts to exact excessive reparations. Passing from the general to the particular, we find that due principally to the outbreak of the "cold war" with the Soviet Union, the policy is to associate ex-enemy states in the common defense against the new enemy. Hence the "peace of reconciliation" with Japan and the current policy toward Germany. In a remarkably short span of time, ex-enemies become our avowed allies. In the interest of peace it is fortunate that this is true. With the new policies, former ideas about military potential or vengeance are outdated.⁸ Policies about utilizing enemy property are more slowly adjusted because of the theory that the interests of American claimants for damage suffered at the hands of the Nazi government (to take but one example) should have precedence. However, in the case of Italy, the United States, realizing the necessity of contributing to the rebuilding of the Italian economy, renounced reparation payments and decided not to utilize all of the Italian assets in the United States available under Article 79 of the Peace Treaty in satisfaction of claims.⁹ Not having made that preliminary decision in regard to Germany, the United States now provides generous aid to the rehabilitation of the German economy. This aid between 1948 and 1954 amounted to \$1,472,000,000.¹⁰ The theory that private (even though enemy) property is not being confiscated is supported by the so-called Bonn Agreement of the German Federal Republic in 1952 to compensate its nationals for properties held by us to provide a general fund for the satisfaction of American claims.¹¹ Under current conditions this arrangement is not the subterfuge it was in 1920 when it was clear the German Government could not foot the bill.¹² But since it is clear that the broad national interest

⁷ On changed conditions in economic warfare and their impact on the policy of dealing with enemy property, see J. Stone, *Legal Controls of International Conflict* (1954), pp. 435-436. Cf. S. A. Lourie, "The Trading With the Enemy Act," *Michigan Law Review*, Vol. 42 (1943), p. 205, at pp. 232-234.

⁸ "After hostilities have ceased there is always, and should be, a period of recapitulation and reappraisal. The harsh and total methods of seizure during the war are weighed in light of the new atmosphere. Inequities are always found to have been done, so that a balancing of interest must be made. We in the United States today are in that national adjusting period." U. S. Senate Report No. 572, 82nd Cong., 1st Sess. (1951), p. 3.

⁹ Jack B. Tate, "International Reclamations and the Peace Settlements," *Proceedings, American Society of International Law*, 1949, p. 27.

¹⁰ Monthly Operations Report of the Foreign Operations Agency, June 30 (1954), p. 42.

¹¹ Statement of Dallas S. Townsend, Assistant Attorney General, Director, Office of Alien Property, Department of Justice, Hearings (cited above, note 6), p. 17.

¹² See testimony of James Riddleberger, Director, Bureau of German Affairs, Department of State, Hearings of the Committee on Foreign Relations, U. S. Senate, 83rd

act of the foreign government is deemed by the forum to be contrary to international law, title deriving from that act may be held null and void.²⁵ If an action of the Alien Property Custodian were considered by a foreign forum to be confiscatory and in violation of international law, one claiming title by virtue of that action might find himself unable to enjoy the full fruits of the property which he thought he had acquired.

It is a commonplace that the United States is interested in the protection of foreign investments. Our general policy encourages private investment of United States capital abroad and seeks to protect it. The "national interest" of the United States therefore dictates consistent application in practice of the rule of respect for private property under all circumstances including postwar settlements.²⁶ One cannot dismiss all situations arising in time of war on the basis of the maxim, *Inter arma leges silent*. John Bassett Moore has pointed out the misuse of the maxim²⁷ and our courts acknowledge that international law operates to restrict the power of a belligerent occupant to confiscate private property.²⁸ Our first "freezing orders" in World War II were designed to protect properties in occupied countries against Nazi confiscations.²⁹ Resort to the International Court of Justice in the matter of alien enemy property would be helpful to the rule of law, although equity may be satisfied by legislation providing for the return of property *ex gratia*. If necessary, United States diplomacy should not be incapable of negotiating settlements of war claims for ourselves and for our Allies in such a way that: (i) equitable results will be obtained; (ii) reliance need not be placed on the dubious doctrine of the lawfulness of the confiscation of enemy alien property, or (iii) on the also dubious doctrine that there is no confiscation if the enemy state is required to assume an obligation to compensate its nationals whose property is held for the satisfaction of claims.

PHILIP C. JESSUP

kaansche Stoomvaart-Maatschappij, 117 F. Supp. (S.D.N.Y., 1953); same case, 210 F. (2d) 375 (2d Cir., 1954); Department of State Bulletin, Vol. 20 (1949), p. 592, this JOURNAL, Vol. 44 (1950), p. 183, note 1. See digests of case *ibid.*, Vol. 42 (1948), p. 726, Vol. 43 (1949), p. 180, Vol. 44 (1950), p. 182, and Vol. 48 (1954), p. 499.

²⁵ Rosenberg v. Fischer, Swiss Bundesgericht, June 3, 1948, *Annuaire Suisse de Droit International*, Vol. VI (1949), p. 139; Confiscation of Property of Sudeten Germans Case, Germany, Amtsgericht of Dingolfing (1948), 1948 Annual Digest, Case No. 12; Anglo-Iranian Oil Company v. Jaffrate *et al.*, Supreme Court of the Colony of Aden (1953), this JOURNAL, Vol. 47 (1953), p. 325.

²⁶ It is possible that the Nottebohm Case (Liechtenstein v. Guatemala, I.C.J. Reports, 1953, p. 111; this JOURNAL, Vol. 48 (1954), p. 327), may reveal the linkage between enemy alien property cases and other confiscatory measures as was envisaged by a Council on Foreign Relations Study Group in 1945; The Postwar Settlement of Property Rights (1945), p. 39.

²⁷ Work cited (note 1 above), p. vii.

²⁸ See State of the Netherlands v. Federal Reserve Bank of New York *et al.*, 201 F. (2d) 455, (2d Cir., 1953), digested in this JOURNAL, Vol. 47 (1953), p. 496.

²⁹ Statement by W. H. Reeves, in Hearings (cited above, note 6), p. 180, at p. 185.

PEACE AND WAR: FACTUAL CONTINUUM WITH MULTIPLE LEGAL CONSEQUENCES

The literature of international law continues to reveal an increasing dissatisfaction with the traditional dichotomy of "peace" and "war" and its attendant allegedly sharp discrimination of relevant, but mutually exclusive, world prescriptions. Many recent writers have described and deplored the common ambiguous and confused use of the two basic terms, and some writers have sought, with varying degrees of clarity, to emphasize that the reference of the terms must be related to particular decision-makers and the purposes of such decision-makers.¹ Building upon this dissatisfaction, Professor Jessup has most recently recommended the recognition and elaboration of a new "state of intermediacy," "a third status intermediate between war and peace," as a mode of eliminating confusion in reference and irrationality in policy.²

The purpose of this editorial is to suggest that decisions about "war" and "peace" are perhaps even more complex than the contemporary literature yet explicitly recognizes and that a mode of analysis much more comprehensive and flexible than either dichotomy or trichotomy may be required if clarity and rationality are to be promoted. It is doubted whether a trichotomy which makes simultaneous reference both to facts of the greatest variety and to the responses which many different decision-makers make to these varying facts for many different purposes can, any more than a dichotomy of similar reference, do much to dispel ambiguity and irrationality.

The principal difficulty in our conventional analysis of "peace" and "war" resides, it is submitted, in this effort to make simultaneous reference to both "facts" and "legal consequences," to both the event to which decision-makers are responding and to their responses and prescriptive justifications for responses, by the invocation of a small number of absolutistic terms. This effort is, for example, most apparent in the often quoted and approved definition of war offered by Judge Moore. The passage reads:

¹ The most cited studies are Grob, *The Relativity of War and Peace* (1949), and Eagleton, "The Attempt to Define War," *International Conciliation*, No. 291 (1933). See also Wright, *A Study of War* (1942), Vol. 1, p. 10; Stone, *Legal Controls of International Conflict* (1954), p. 312; Schwarzenberger, "Ius Pacis ac Belli," this JOURNAL, Vol. 37 (1943), p. 460; McNair, "The Legal Meaning of War and the Relation of War to Reprisals," *Grotius Society Transactions*, Vol. 11 (1926), p. 29; Ronan, "English and American Courts and the Definition of War," this JOURNAL, Vol. 31 (1937), p. 642; Borchard, "War and Peace," this JOURNAL, Vol. 27 (1933), p. 114; Tucker, "The Interpretation of War under Present International Law," *International Law Quarterly*, Vol. 4 (1951), p. 11 (with an excellent statement of the indispensability of the distinction between permissible and non-permissible violence).

The thrust of the Grob study is admirable but its conceptualism is often muddy, including demands for "right" answers, and it seeks to relate definitions more to existing technical "rules" than to particular problems, particular decision-makers, and particular policies. See, for examples, pp. 188, 192, 200, 36, 176, 178.

² Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?", this JOURNAL, Vol. 48 (1954), p. 98, and "Intermediacy," *Nordisk Tidsskrift for international Ret*, Vol. 23 (1953), p. 16.

Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights.³

Note the intermingled references to factual events and "legal condition" and the unquestioned assumption of a single meaning for all parties and purposes. Our contemporary books abound with equivalent definitions of war⁴ and with comparable definitions of such subsidiary concepts as neutrality.⁵ The question is by what framework of inquiry can such ambiguity, and its spawn of irrational decisions, be escaped or minimized in maximum degree.⁶

Search for an adequate framework of inquiry might, it is suggested, begin with some preliminary orientation with respect to the events to which decision-makers respond—that is, with respect to the facts of coercion across nation-state boundaries.⁷ In highest-level abstraction these facts might perhaps be best described as a continuous process of attack and counter-attack in which the elites of one or more nation-states employ all instru-

³ Moore, *Digest of International Law*, Vol. 7 (1906), p. 153.

⁴ Thus Hyde, *International Law* (2d rev. ed., 1945), Vol. 3, p. 1686: "A state of war is a legal condition of affairs dealt with as such, and so described both by participants and non-participants."

Eagleton (above, note 1) offers a wide selection of such definitions of varying dates.

Wright early recognized the need for distinguishing war "in the material sense" from war "in the legal sense." "Changes in the Conception of War," this JOURNAL, Vol. 18 (1924), pp. 755, 762. He further emphasizes this need in his two-volume study, but he also makes frequent use of a definition which runs: "War is a legal condition which equally permits two or more hostile groups to carry on a conflict by armed force." Wright, *A Study of War* (1942), Vol. 2, p. 698. See also Vol. 1, p. 8.

Contrastingly, overemphasis upon the facts of coercion, and underemphasis upon the rôle of decision-makers, is apparent in Professor Borchard's occasionally quoted query: "Is it not a strange doctrine that would make the *existence* of war depend on recognition by anybody?" *Loc. cit.*, note 1, above. Quoted in Briggs, *The Law of Nations* (2d rev. ed., 1951), p. 975.

⁵ Thus, Komarnicki, "The Place of Neutrality in the Modern System of International Law," *Hague Academy of International Law, Recueil des Cours* (1952), p. 401: "Neutrality is a legal status involving certain rights and duties." Cf. Stone (note 1, above), at p. 380.

⁶ The mode of analysis here suggested reflects collaborative work with the writer's colleague, Professor Harold Lasswell, and with his students, Florentino P. Feliciano, William T. Burke, and Peter Stern.

⁷ Coercion, as contrasted with persuasion, may be taken to refer to constraint imposed either by severe deprivations or by threats of such deprivations. Such ancillary concepts as force, violence, and conflict may be taken to refer, respectively, to coercion directed against the well-being of the target, to intense uses of force, and to aggregates of people in which the use of any form of coercion is intense.

ments of policy (diplomatic, ideological, economic and military), in alternative stages of acceleration and deceleration in degrees of intensity of coercion, against the bases of power (people, resources, institutions) of other target nation-states, and are themselves targets in return, for objectives which range from the inducing of the target nation-states' withdrawal, abstention, co-operation, or reconstruction in various forms to, at the extreme of coercion, their incorporation or destruction.⁸ Each participant or practice in this process might in any given context be made subject to investigation in any detail necessary or possible: Just who are the initiating and counterattacking elites and what are their overt and covert objectives? Precisely by what practices in the use of diplomatic, ideological, and economic instruments, interrelated how in what acts and declarations, do they progress from less intensive measures of coercion to the most destructive use of the military instrument? Who are the combatants, who attack what people and resources, in what area, by what weapons, and with what degree of destruction? What measures are taken against people, resources, and institutions in territory occupied from the enemy or from non-participants or allies? What measures are taken against the activities and resources of hostile persons found within an elite's own territorial domain? What appeals are made to the officials in international organizations (universal or regional) to take action with respect to the coercive measures? What choices are made by elites in nation-states other than of the initial attackers and counterattackers, with respect to either participation in the conflict or continued or new relations with either or both of the contending groups? By what specific practices, with what acts and declarations, do the contending parties decelerate the violence of their interactions and resume relations in which coercion is less intense? Such questions are offered as suggestive merely of the general type of preliminary factual orientation recommended.

Having obtained such preliminary orientation in the events which constitute international coercion, an observer might next inquire generally how community intervention is organized to regulate such events: What decision-makers are authorized and maintained by what communities (world, regional, national), to make what decisions about what particular events, for what policy objectives, and by the application of what prescriptions and procedures? The decision-makers so authorized and maintained might be observed to include both international officials (judges of the International Court of Justice, arbitrators, members of the Security Council of the United Nations, etc.) and nation-state officials, including officials of nation-states both participant and non-participant in the coercion, and both civilian (legislative, executive, and judicial) and military (of relevant hierarchy in rank). For policy objectives relating to the maintenance of world public order, for the enforcement of a community-wide prohibition against unauthorized coercion, certain decision-makers might be observed in certain contexts to discriminate, in accordance with

⁸ Appropriate modification of this statement might of course be made to take into account the internal conflicts commonly described as civil war.

their authorizations, between the different coercive measures that nation-state elites employ against each other, deciding that some measures are non-permissible but that others are permissible, and to justify their discrimination of such measures by application of a set of polar or complementary prescriptions, labeling the non-permissible coercion as "war" or "aggression" or "breach of the peace" or "threat to the peace" and the permissible coercion as "self-defense" or "collective self-defense" or "collective peace enforcement" or "collective police action." For policies relating to the promotion of universal or common responsibility for the maintenance of world public order or, alternatively, to the limitation of the area and intensity of coercion, other decision-makers might be observed to be making decisions about required participation or permissible non-participation in collective security measures or other coercive measures and, in the event of decision for permissible non-participation, about the interrelations of participants and non-participants in respect to the control of persons, goods, and resources, and to be justifying such decisions in terms of both conventional and customary prescriptions which dichotomize "war" and "no-war" or "neutrality," or "belligerency" and "non-belligerency." For determining the permissibility or non-permissibility of a great variety of controls over people and resources, with respect to both a participant nation-state's own nationals and enemy nationals, other decision-makers might be observed to be appraising the degrees of intensity of coercion in attack and counterattack and justifying decisions in terms of prescriptions which distinguish the "initiation" of "war" from the continuance of "peace." For promoting the minimum destruction of values in situations of conflict, contexts in which the prohibition of coercion has failed, still other decision-makers might be observed to be passing upon the legitimacy of combatants, of objects of attack, of areas of attack, of weapons and degrees of destruction, and of various controls over people and resources in areas occupied from an enemy, and to be justifying decisions by invocation of complementary prescriptions about "military necessity" and "humanitarianism" or "reprisals" and "proportionality of reprisals." For determining the continued legitimacy of a wide variety of controls over people and resources, with respect to both a participant nation-state's own nationals and enemy nationals, still other decision-makers might, for final example, be observed to be appraising a decelerating intensity of coercion and to be justifying decisions in terms of the "termination" or continuance of "war."

From the perspective of such orientation with respect to both the facts of international coercion and the responses made by authoritative decision-makers to such facts, an observer might reasonably conclude that the technical terms "peace" and "war," and all their subsidiary, dichotomous, and complementary prescriptions, insofar as they refer to the *facts* of coercion, embrace between their polar extremes a continuum⁹ of coercive practices of infinitely varying modalities and degrees of intensity, and,

⁹ Description in terms of a continuum is employed by both Schwarzenberger and Wright, cited above, note 1.

doubtful cases. They all have significantly to do with cases of fusion³ or dismemberment⁴ of states or with so-called "resurrected" states⁵ and, in one particularly important case,⁶ with conquest not followed by annexation. These uncertainties in international law are by no means a new phenomenon. They arose in many cases during and after the long Napoleonic Wars, particularly with regard to "resurrected" states. Such uncertainties have also arisen in less troubled times.⁷

The identity *vel non* of a state is of the greatest practical importance. The international rule determining the identity of a state under certain conditions is not only in the interest of the state concerned, but guarantees a legally ordered development of international relations between states, gives security to third states by guaranteeing the continuity of treaties,

³ The Kingdom of the Serbs, Croats and Slovenes. For identity with Serbia, see Tomitch, *La formation de l'État yougoslave 1927*; for a new state, with convincing arguments, see E. Kaufmann, in *Zeitschrift für Völkerrecht*, Vol. 31 (1923/24), pp. 211-251.

⁴ The Republic of Austria, 1918: Austria regarded herself as a new state; but for identity with the Empire of Austria, see the Peace Treaty of St. Germain; Hungary, 1918: for identity with pre-war Hungary, see the Peace Treaty of Trianon; this was also the attitude of postwar Hungary herself.

⁵ Czechoslovakia, Albania, Ethiopia. See also the divergent opinions as to whether the Austria of 1945 is identical in law with the Austria of 1918. For identity, the Austrian Government since 1945, and most Austrian writers (Adamovich, Verdross, Verosta, Klinghoffer, Seidl-Hohenveldern). For a new state, the last Chancellor of the 1938 Austria, Schuschnigg ("The Austrian Peace" in *Annals*, 1948, pp. 106-118), Kelsen, most German (e.g. W. Schätzel, H. Jellinek) and many foreign writers. The Moscow Declaration of 1943 is highly ambiguous in its wording; also doubtful is the Austrian Nationality Law of 1945. The practice of states at the time of the German annexation of Austria in 1938, in the period between 1938 and 1945, and in 1945 and after, varies not only with different states, but sometimes with one and the same state. There are national court decisions in favor of identity (e.g., *Bruni v. Pizzorno*, Corte d'Appello di Torino, July 28, 1948) and for the recognition of the German annexation (e.g., *Matter of Mangold's Patent* (1951), 68 R. P. C. 1, Lloyd). See also the recent decision of the West German Federal Administrative Court in Berlin, ruling that 75,000 Austrians living in Germany must be regarded as German nationals. Judge Wichert ruled that the annexation of Austria by the Third Reich had been acknowledged in international law, and, therefore, the legality of German citizenship, acquired by the Austrians in 1938, could not be challenged. This, the judge said, was also the basis of the Austrian Citizenship Law of 1945. Only German law can determine, under international law, how German citizenship is acquired and lost. The Austrian state, the judge stated, had been restored as a result of a political decision of the Allies, without, however, regulating this problem. This problem, he stated, would have to be settled in the state treaty or by agreement between Austria and Germany (*The New York Times*, Oct. 31, 1954, p. 2). Thus the present situation of Austria "is far from being free from dangerous ambiguities" (M. Rheinstein in *Michigan Law Review*, Vol. 47 (1948), p. 34).

⁶ Germany, 1945. See Josef L. Kunz, "The Status of Occupied Germany: a Legal Dilemma," in *The Western Political Quarterly*, Vol. 3, No. 4 (Dec. 1950), pp. 538-565.

⁷ The classical example is the formation of the Kingdom of Italy. For a new state, see D. Anzilotti, in *Rivista di Diritto Internazionale*, 1912, pp. 1-33; for identity with the Kingdom of Piedmont—and that has become the dominant opinion—Romano, *ibid.*, pp. 345-367. The problem was still involved in a recent case, *Gastaldi v. Lepage Hemery* (Annual Digest, 1929-30, Case No. 43).

of international obligations, including concessions, contracts, debts, and so on, and by furnishing the basis for the continued international responsibility of the state. In view of this importance, it seems strange that there is so much uncertainty. What are the reasons for this state of things?

Apart from the fact that the whole problem of identity is problematical from a philosophical point of view—some writers speak rather of the “continuity”⁸ of states—there is, first of all, confusion in the doctrine which has been unable to reach either a clear or a unanimous position with regard to the problem of the identity of states under international law. The science of international law has given to this problem relatively scant consideration and mostly only incidentally, not as one problem. This is true of many treatises, although those of Verdross⁹ and Kelsen¹⁰ are an exception; the problem is also mostly only incidentally dealt with in monographs on such topics as nationality, coming into existence or extinction of states, and treaties. There is a paucity of monographs¹¹ on this problem as such, although we have now the recent monographs of Verdross¹² and Cansacchi.¹³

There is, moreover, the fact that political influences sway many writers on this topic, so that they approach the problem with preconceived solutions corresponding to their political wishes. But one of the principal reasons for the confusion of the doctrine is the deep split among writers as to fundamental problems. For many adherents of the “dualistic” doctrine, Italians and Germans,¹⁴ the coming into existence and the extinction of states are purely historical, political facts and international law has no competence to deal with these matters. The only logical consequence, in starting from this basis, is not only that international law does not, but that it *cannot* contain norms concerning the identity of states. If, on the other hand, these writers, in contradiction to their own basic theory, feel compelled to admit that there *are* principles of international law concerning the identity of states, they must take refuge in wholly artificial explanations. Thus Quadri teaches that there is no problem of “identity” of states; in reality, this is only a particular case

⁸ But Cansacchi sees in “identity” and “continuity” two different problems, particularly with regard to “resurrected” states. “Identity,” according to him, means only identity *after* the state has come into existence again, whereas “continuity” pretends that the state also continued during the period of its extinction.

⁹ A. Verdross, *Völkerrecht* (2nd ed., Vienna, 1950), pp. 161-163.

¹⁰ H. Kelsen, *Principles of International Law* (New York, 1953), pp. 259-264, 416.

¹¹ Herz, *Die Identität der Staaten* (Düsseldorf, 1931); *idem* in *Zeitschrift für öffentliches Recht*, 1935, pp. 241-268; M. T. Badawi, *La continuité et l'extinction de la personnalité de l'état* (Thesis, Lyon, 1940).

¹² A. Verdross, “*Die völkerrechtliche Identität der Staaten*,” in *Festschrift für Heinrich Klang* (Vienna, 1950), pp. 18-21.

¹³ Giorgio Cansacchi, “*Realtà e finzione nell'identità degli Stati*,” in *Comunicazioni e Studi*, Vol. IV (Milan, 1952), pp. 23-97.

¹⁴ E.g. Cavaglieri, Fedozzi, Strupp, but also de Louter. See recently, particularly, Arrangio-Ruiz, *Gli Enti soggetti dell'ordinamento internazionale* (Milan, 1951); R. Quadri, *Diritto Internazionale Pubblico* (Palermo, 1951). This is also the basic presupposition of Cansacchi, whereby his whole, otherwise very interesting, investigation is vitiated *a priori*.

of state succession: a state which has undergone a revolutionary change of government thereby becomes extinct; a new state is formed immediately with universal succession to all the rights and duties of the old state. It is hardly necessary to point out that this construction is, in the light of the practice of states, wholly untenable. Cansacchi admits the international rule concerning the identity of states, but teaches that it constitutes a genuine "fiction" vis-à-vis "reality"; hence the title of his article. But Cansacchi means by "reality" not the reality of natural sciences, but of municipal law, a *legal* reality. Recently also Charles de Visscher¹⁵ has taken the position that international law does not create the state, but presupposes it. But, neither does municipal law "create" the individual: it attributes legal personality and it can make this personality extinct, even if "in reality" the human being remains identical.¹⁶

International law, like every legal order, must determine who its subjects are and what the conditions are for their coming into existence, extinction, and for their remaining identical in law. It is perfectly possible to speak historically, politically, of Poland of 1920 as being the same as the Poland which became extinct in 1795; but as a legal statement it would be untenable. The problem of the identity of states under international law is a *legal problem*.

Perhaps the most important reason for the lack of clarity and agreement in the doctrine concerning the problem of the identity of states is the uncertainty of the corresponding rules of international law itself. International law determines that a new sovereign state has come into existence if four conditions are fulfilled: an organized and effective legal order, valid for a certain territory and population; this legal order must, further, be exclusively and immediately subject to international law and not to any other national law. International law determines, further, that the disappearance of one of these four elements has as a legal consequence the extinction of the sovereign state. International law, finally, determines that *certain* changes as to the one or other or more elements will *not* have the legal consequence of the extinction of the state, but leaves its identity intact.

Let us first eliminate the hypotheses, where the corresponding norm of international law is perfectly clear and precise. As changes are bound to occur, what may be called "normal" changes do not affect the identity of the state, such as changes in population through increase or decrease by births and deaths, through emigration and immigration, even if on a very high scale,¹⁷ or changes in the ethnical composition of the population. Equally, normal changes in territory, as, *e.g.*, by accretion or avulsion, while they have legal effects, do not affect the legal identity of the state or states concerned. The same is true of changes in government through

¹⁵ *Théories et Réalités en Droit International Public* (Paris, 1953), pp. 204-205.

¹⁶ *E.g.*, under Roman law loss of personality through becoming a prisoner of war. On the other hand, a slave, a thing in law, becomes a person through manumission; see also the *mort civile* of former French law.

¹⁷ The young U. S. with five million and the present U. S. with one hundred and sixty million of inhabitants is, of course, the identical state in law.

death or election and of any change in the form of government or contents of the legal order, brought about in conformity with the constitution of the state in question.

On the other hand, it is clear that the total loss of population would bring about the extinction of the state. Here it can already be seen—and that is true with regard to changes in any element—that the identity of the state continues, *except* where, by such change, it legally ceases to exist. The problem of the identity of states is not the antithesis of the problem of state succession, but of the problem of the extinction of states.

Apart from "normal" territorial changes there is also a principle of general international law which, insofar as it is clear, can be thus formulated: Territorial changes, whether by increase or reduction of territory, *in general* do not affect the identity of the state. Under this rule fall, for instance, the great territorial increase of the United States, the cession of a province by one state to another, the secession of a part of the state or of a colony, constituting itself—often by revolution or war—a new independent state.¹⁸ Thus far the law, the practice of states, and the doctrine¹⁹ are unanimous. It is equally agreed that the *total change* of territory by a people which, under the same government and law, settles in a different territory, leaves the identity of the state intact.²⁰ But it is equally clear that total loss of territory, *i.e.*, by total cession,²¹ brings the identity of a state to an end.²²

But, as stated, this norm of general international law is valid only *in general*. It constitutes only the general principle to which there are exceptions. Some writers²³ are of opinion that the exception is given by the circumstance that the territorial change is "quantitatively very considerable." But the practice of states shows that the Republic of Turkey, in spite of considerable territorial losses, was held identical with the Ottoman Empire; that Poland, although she lost in the east half of her territory and suffered a considerable decrease of population, is held to be identical today with the Poland of 1920. Other writers point rather to the real issue: the territorial change must leave "a part of the territory which can be recognized as an essential portion of the old state,"²⁴ or the state con-

¹⁸ Thus, *e.g.*, the identity of the British Empire in spite of the coming into existence of the U. S.; of Sweden in spite of the separation of Norway; of The Netherlands in spite of Belgium and Indonesia; of Russia in spite of the territorial loss brought about at the end of the first World War through the coming into existence of Poland, Finland, and the Baltic Republics.

¹⁹ Hence the so-called "principle of the variable limits of treaties."

²⁰ The Boer Republics after the "trek." ²¹ *E.g.*, Corea, 1910.

²² An exception, laid down by a norm of international law, is that even total occupation of the territory of a state and destitution of its government by a belligerent occupant does not constitute conquest and subjugation and leaves, therefore, the identity of the state in question intact, as long as allies of the occupied state continue fighting. (Poland, Yugoslavia in the second World War).

²³ P. Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel* (1925), pp. 18, 19; *idem*, *Lehrbuch des Völkerrechts* (1948), Vol. I, p. 407.

²⁴ Thus, W. E. Hall, *A Treatise on International Law* (7th ed., Oxford, 1917), p. 22.

cerned must retain its consistency.²⁵ While correct, these are rather tautological statements, telling us that territorial changes do not affect the identity of the state, except when they do. It really means that, under the rule of general international law, territorial changes do not affect the identity of the state, except if they legally lead to the extinction of the state. But international law does not contain universally valid and obligatory criteria as to what must be the extent or the nature of territorial changes in order to lead to the extinction of the state. The international norm does not specify the exceptions to its general principle. It is this uncertainty in the rule of general international law which leads, particularly in cases of fusion, like Yugoslavia in 1918, or of dismemberment, like the Republic of Austria in 1918, to uncertainty both in the doctrine and in the practice of states.

There is also another old and fully recognized principle of general international law under which the identity of a state in international law is not affected by unconstitutional changes in government, whether brought about by revolution or coup d'état. This rule is so unanimously recognized by writers since Grotius and Bynkershoek, by the practice of states, as illustrated by the well-known London Protocol of February 19, 1831, and by national and international court decisions, that it is superfluous to give quotations. It is irrelevant how far-reaching the revolutionary changes may be; as is also the change of the name of the state. True, the Soviet Government insisted that the rule does not apply to the case of the Bolshevik revolution; but all the other states reaffirmed this rule of general international law, which certainly is the international law actually in force. Occasional considerations that "there is room for reconsideration of the norm"²⁶ under exceptional circumstances, are proposals *de lege ferenda*. It is equally clear that the fact that the revolutionary regime was a so-called "intermediary" government or was not recognized, in no way affects the identity of the state.²⁷ For the non-recognition of a *de facto* government leaves the recognition of the state intact.²⁸

The theoretical construction is different with different writers. Some adherents of the "dualistic" doctrine, following the reasoning of Aristotle, hold that the legal order is the most important element of the state; hence, revolutionary change extinguishes the state.²⁹ But Kelsen does not follow Aristotle; he says that this would be the case only if there were no international law, but that revolutionary change is now, by international law,

²⁵ Thus, F. v. Liszt, *Das Völkerrecht* (12th ed., 1925), p. 275.

²⁶ Thus, Oppenheim-Lauterpacht, *International Law. A Treatise* (7th ed., London, 1948), Vol. I, p. 148, n. 2.

²⁷ The Tinoco Arbitration, this JOURNAL, Vol. 18 (1924), p. 147.

²⁸ See Acting Secretary of State to Attorney General of New Jersey, Oct. 31, 1922 (U. S. For. Rel., 1922, Vol. II, p. 715), and many court decisions, e.g., *The Sapphire* (U. S. Supreme Court, 1871, 11 Wall. 164), *Lehigh Valley Railroad Co. v. State of Russia* (U. S. 1927, 21 F. 2d 396), and many others.

²⁹ Cansacchi, following Kelsen on this point, holds that the state becomes extinguished only when the revolutionary change can no longer be based on the pre-revolutionary "Grundnorm" of the constitution.

a form of change that does not affect the identity of the state. Kelsen holds that, with regard to the identity of the state, in spite of revolutionary changes, the most important element is territory:³⁰ revolutionary changes do not affect the identity of the state, "if the territory, by and large, remains the same." For many writers since Grotius and Bynkershoek³¹ population is the essential element and this thesis has recently been vigorously defended by Verdross. But, apart from the fact that the Latin term *populus* and the English and French term "nation" means the *state* rather than the population, Verdross speaks of the population as "the people organized as a state." Where there is no organization at all the state becomes extinct in international law. Here again the problem of identity is the antithesis of the problem of the extinction of the state. The norm of general international law guarantees the identity of the state, in spite of revolutionary changes, as long as this state does not become extinct; for when a state becomes extinct under international law, there can, of course, be no identity,³² even if territory and population remain the same.³³ Now general international law contains no special norms, according to which, under certain conditions, a state which has lost *all* government and also its immediacy to international law, nevertheless does not become extinct if it is "resurrected" within a reasonable time.

It is this uncertainty or lack of a norm of general international law regarding so-called "resurrected" states that is the reason for the uncertainty of the practice of states and of the doctrine, both of which use rather political arguments. Thus, in the case of Germany the argument is used that a state only becomes extinct if its territory and population are definitely imputed to other states, that in the case of Germany at least subordinate organs represented the state. But it is well known that the Occupying Powers took over the supremacy over all federal, state, and local organs, so that *all* organs depended on them. *All* law in occupied Germany in 1945 after the unconditional surrender had its only reason of validity in the supremacy of the Occupying Powers. Even in 1954 there was still no sovereign Germany. Now the Bonn Republic will finally become an almost sovereign state, but a state which does not control the German Democratic Republic or the two Berlins, a state which contains neither the pre-war Germany east of the Oder and Weichsel, nor the Saar, and where for nearly ten years there has been no sovereign state at all. Under these conditions it seems impossible not to recognize that it "is

³⁰ Fricker and Preuss had, very differently, put the emphasis on territory as the most important element, by asserting that *any* territorial change, also without revolution, necessarily extinguishes the state, a statement fully in contradiction with positive international law.

³¹ Thus, *e.g.*, Anzilotti, Cavaglieri, Fedozzi, Ottolenghi. Cansacchi also insists on the element of population, but only as an element for what is for him basically a fiction.

³² T. J. Lawrence (*The Principles of International Law* (7th ed., London, 1925), p. 89) writes that revolutionary changes, in spite of non-recognition of the *de facto* government, do not affect the identity of the state; but "a state loses its existence where it is obliterated as a subject of international law."

³³ As with the Boer Republics in 1902 or Corea in 1910.

clearly not identical with the former German Reich. It is a new state . . . a successor state to the German Reich."³⁴

In the cases of Ethiopia, Czechoslovakia, and Austria, where it cannot be denied that population and territory *were* imputed to other states, other arguments are used: no sufficient duration, merely *de facto* recognition of the annexation, unlawful character of the annexation making it only an "occupation," and the "non-recognition-doctrine." But none of these arguments is very solid from a legal point of view. Obviously, a certain duration is necessary; it forms an element of the effectivity prescribed by international law; but four years in the case of Ethiopia, seven years in the case of Austria, seem to fulfill this requirement, especially as in 1936 and 1938 those annexations were taken to be definitive; it was only the outbreak of war which again put them in question.

These annexations *have* been recognized, however reluctantly, by most states. No one can deny that the United Kingdom recognized Italian sovereignty over Ethiopia *de jure*, a recognition which is irrevocable in international law. As far as the "non-recognition doctrine" goes, it is not pertinent in these cases. In addition, this doctrine is not, as is sometimes believed, a sanction, but merely a political statement which needs a sanction. If nothing is done to change the situation, the illegal act will stand. But even if something is done successfully, it can, at the best, restore the *status quo ante*; it can act *as if* the illegal act had not occurred, but it cannot make the illegal act undone, just as municipal law can punish the murderer, but cannot revive the dead man. The declarations that the annexation of Austria or the Munich Agreement are "null and void" are *ex post facto* political statements in time of war. As de Visser³⁵ correctly states, the resurrection of Ethiopia was due to the outbreak of war, not to the "non-recognition doctrine." *A contrario*, we can point to the illegal annexation of the Baltic Republics by the Soviet Union, against which some states applied the "non-recognition doctrine." But even these states did not and do not now expect that this state of things will be changed. But in case of a new war, these problems might very well be revived and this annexation declared "null and void."

On the other hand, the doctrine *can* point to the practice of states which shows cases in which states acted in instances of "resurrected" states, recognizing the identity of such states, contrary to the norm of general international law under which they had become extinct. But the practice of states after the Napoleonic Wars and in our times not only differs among different states with regard to the same case, and differs with the same state as to different cases, but it often changes in time with the same state toward the same case, and even in the same case diplomatic practice or even treaty norms are often ambiguous, lacking in consequence or contradictory. Thus Ethiopia seems to represent an "automatic" revival, since Italy in the Peace Treaty of 1947 only had to recognize Ethiopian sovereignty and not renounce Italian sovereignty, as should have been done

³⁴ E. Plischke, in *Political Science Quarterly*, Vol. 69 (June, 1954), p. 262.

³⁵ *Op. cit.* (above, note 15), p. 208.

in accordance with classic international law. On the other hand, the Allies promised only to re-establish a sovereign Austria; and Austria, whether a new state or identical with the 1938 Austria, is not yet a fully sovereign state even in 1954. On the one hand, Hitler's annexation was declared "null and void"; consequently what the Germans took in Austria should have been restored to Austria; but the Potsdam Declaration gave the "German assets in Austria" to the Soviet Union. It would be easy to show a long line of other ambiguities and contradictions in the practice of states.

In a word, a scrutiny of the practice of states after the Napoleonic Wars and since 1914 shows convincingly that no new general international rule concerning such cases has been developed; there is neither an established clear usage, nor the *opinio necessitatis*. States have acted, and do act, in such cases less according to legal considerations than according to what Lauterpacht once called "the amorphous principles of politics." It is the uncertainty of the law—the lack of the determination of exceptions to the general norm of identity in spite of territorial changes, and the lack of determination of the conditions under which the rule of identity works in spite of revolutionary changes, notwithstanding the extinction of the state under another norm of general international law—which is the ultimate reason for the lack of clarity and agreement in the doctrine.

JOSEF L. KUNZ

NOTES AND COMMENTS

ARTHUR K. KUHN A PATRON OF THE SOCIETY

In accordance with the Regulations of the American Society of International Law concerning Patrons, adopted on May 1, 1943, the Executive Council of the Society, meeting on October 16, 1954, having been informed of Mr. Kuhn's bequest of \$5,000 to the Society, unanimously declared him a Patron of the Society posthumously, and directed that Mr. Kuhn's name be listed in each number of the *American Journal of International Law* as prescribed by the Regulations. Mr. Kuhn's name therefore appears on the inside of the front cover of the *Journal*, beginning with the October, 1954, issue, as a Patron of the Society, under the heading "In Memoriam."

E. H. F.

49TH ANNUAL MEETING OF THE SOCIETY

The 49th annual meeting of the American Society of International Law will be held at the Sheraton-Carlton Hotel in Washington, D. C., from April 28 to April 30, 1955. The program is being planned to appeal to the interests of the principal groups which comprise the membership of the Society. The three groups of members of the Society, all of whom contribute to the development of international law, have somewhat different and overlapping interests. These groups are the practitioners, government officials and the teachers. Due regard should be had for the interest and support of those concerned with international relations. The plan of the meeting attempts to balance the interests of these various groups. It proceeds on the theory that the Society and its members desire to deal with specifics and work and discuss the law of the present and the future.

The plan assumes that the greatest use can be made of the collective time of the members if basic documents are available well ahead and if certain members are requested to formulate comments, thought out in advance, on specific phases of the documents. Therefore, the plan is based on the idea of papers circulated in advance.

The three meetings on Friday, April 29th, will be called "Panels" and the atmosphere of a round-table discussion will be sought, even though it is hoped that the number of participants will be in excess of the usual number sitting around a table. Each Panel will consider one principal paper. Then there will be several comments on different aspects of the paper, with the remainder of the time set aside for general discussion.

It is expected that the principal papers will be circulated to the chairmen, reporters and commentators one month before the annual meeting. The commentators will be asked to comment on different specific phases of the same paper. After discussion by the commentators, there will be a reasonable period for general discussion. Maximum time allowances will be set in advance for the chief speaker and commentators. Sternly ap-

plied arithmetic will, it is hoped, insure sufficient time for general discussion.

It will be the function of the reporters of each Panel to prepare summaries of the discussions, mentioning specifically the name of each member who has participated in the discussion. The summaries will appear in the printed *Proceedings* of the meeting.

The sessions will open on Thursday evening, April 28, at 8:15 p. m., with an address by President Philip C. Jessup.

The sessions on Friday, April 29, as indicated above, will be panel sessions, the chairmen, principal speakers and reporters for which will be announced later. At the first session, beginning at 9:30 a. m., the topic for discussion will be recent developments in regional organization in the free world and the Soviet bloc, including China; an analysis of the underlying forces and legal techniques; and the impact on bilateral diplomacy and the United Nations system. The second session on Friday, beginning at 2:30 p. m., will be devoted to discussion of international law and current problems in the Far East. The third session, opening at 8:15 p. m. on Friday, will consider the practice and procedure for international claims commissions, including general principles and the techniques of effective presentation of claims, and the manner in which questions of international law are presented to American courts.

On Saturday, April 30, beginning at 10:15 a. m., the business meeting will be held at which reports of committees will be heard and election of officers take place. The annual dinner, which concludes the sessions, will be held on Saturday evening, at 7:00 p. m. The President of the Society will preside, and it is expected that several distinguished speakers will discuss the topic of the peaceful uses of atomic energy and disarmament.

It is planned to hold an informal cocktail party on Friday afternoon, April 29. The time and place will be announced later. It is hoped that the schedule of the President of the United States will make it possible to resume the custom of informally receiving the members of the Society at the White House at some time during the annual meeting.

ELEANOR H. FINCH
Executive Secretary

INTERNATIONAL LAW ASSOCIATION

The Forty-Sixth Biennial Conference of the International Law Association met at Edinburgh during the week of August 8-14, 1954. The retiring president was Professor Gutzwiller of the Swiss Branch; the incoming president was Lord Normand of the British Branch. There appeared to be some feeling that it was really a Scottish Branch to which Lord Normand belonged, and perhaps this will eventuate along with a Scottish Parliament which was also a subject of discussion in local newspapers. In any case, the Scottish hosts provided efficient administration and enjoyable hospitality for the Conference. Around forty members of the American Branch attended. The Conference heard with sorrow of the death of Arthur K. Kuhn, a founder and Honorary Vice President of the American Branch.

Upon report of the Committee on Review of the United Nations Charter (Judge Boeg, Chairman, and Professor Schwarzenberger, *Rapporteur*), a resolution was adopted continuing the work of the committee and urging it to direct its efforts toward "strengthening the rule of law in the world community by co-ordinating, broadening and stimulating the development of legal activities within the United Nations." The committee is to work through the national branches and co-ordinate their suggestions for later report.

The Committee on Insolvency, whose report reflected primarily the views of the French Branch, was instructed to continue its study upon the basis of recommendations made by the British Branch, and to take into consideration proposals offered by other branches. In this debate, Professor Nadelmann of the American Branch played an active part.

The Committee on International Monetary Law (Professor Gutzwiller, Chairman, and Dr. F. A. Mann, *Rapporteur*) was asked to continue its work "with a view especially to clarifying Article VIII 2(b) of the Bretton Woods Agreement and making that Article practicable to lawyers and acceptable to governments."

Mr. Richard Young presented the report of the Committee on Seabed and Subsoil. The Conference adopted a resolution suggesting restatement of Articles 1, 2 and 8 of the draft prepared by the International Law Commission. Article 1 would define "continental shelf" as the "seabed and subsoil of marine areas contiguous to the coast but outside the area of the territorial sea, where the depth of the super-adjacent waters does not exceed one hundred fathoms." By Article 2, the coastal state would exercise sovereign rights over the continental shelf for exploring and exploiting its natural resources, which were to include "marine resources permanently adherent to the seabed and sedentary fisheries but not any other fisheries." By Article 8, "disputes should be submitted at the request of any of the parties to arbitration," or other agreed method of pacific settlement.

On the report of the Committee on Family Relations (Mr. Wm. Latey, Chairman, Mr. K. Lipstein, *Rapporteur*) the Conference approved the Draft Convention on Recognition and Enforcement Abroad of Maintenance Obligations submitted to the Economic and Social Council of the United Nations, but with the suggestion that it include a specific article "whereby a maintenance order should be mutually enforceable as between the contracting states, notwithstanding the fact that such order may be subject to variation by the Court which made it." The International Law Association, as a Non-Governmental Organization in consultative capacity, will make this recommendation to the Economic and Social Council.

Professor Eagleton proposed study of the use of waters in international rivers, and a committee was set up under his chairmanship to "study the various legal, economic and technical aspects of this most important matter."

Various other subjects were more briefly discussed, such as Air Law, Trade Marks, International Company Law, Immunity of States, National-

ity, and Supranational Companies, without adoption of resolutions. There was some feeling that the Conference, though interesting and useful, was not as fruitful as it might have been, and consideration is being given to means by which more effective work can be done. One such method is to have preparatory work done by branches in addition to, or in place of, reports by regular committees. A committee was also established to study means of co-operation and of avoiding duplication with the work of other associations.

CLYDE EAGLETON

46TH SESSION OF THE INSTITUTE OF INTERNATIONAL LAW

The 46th session of the Institute was held from April 22 to May 1, 1954, at Aix-en-Provence under the chairmanship of its senior member and president, M. Albert de La Pradelle. This very successful meeting, in which 76 members and associates representing 25 nations participated, has shown that smaller cities like Bath, Siena and Aix, are most appropriate for the deliberations of the Institute.

At this session the late lamented Arthur Kuhn (New York) and Sr. Haraldo Valladão (Brazil) were elected to the Board, M. Charles De Visscher (Belgium) was elevated to the rank of Honorary President, and Hans Kelsen (Rhode Island, U. S. A.) was named Honorary Member of the Institute. Messrs. Batiffol and Rousseau (France), Castberg (Norway), Edwin D. Dickinson (U. S. A.), Sir Gerald Fitzmaurice (United Kingdom), Paul Guggenheim and Max Gutzwiller (Switzerland), Green H. Hackworth (U. S. A., Judge of the International Court of Justice), Rulolf Laun (Hamburg, Germany) and López Oliván (Spain), were given full membership.

Nine new associates were selected. They are Ricardo Alfaro, former President of the Republic of Panama; André Audinet, Dean of the Law Faculty at Aix-en-Provence; Giacinto Bosco, Senator of Italy; Louis Cavaré, Professor at the University of Rennes, France; Georges Maridakis, Professor at the University of Athens, Greece; J. H. Morris, of Magdalen College, Oxford, England; Johannes Offerhaus, of Amsterdam University, The Netherlands; Paul Ruegger, President of the International Red Cross Committee, Geneva, Switzerland; Paul De Visscher, of Louvain University, Belgium.

Four reports were discussed and resolutions adopted in plenary meetings, dealing with amendments desirable in the Statute of the International Court of Justice, the determination of the "reserved domain" and its effects, immunity of foreign states from jurisdiction and measures of execution,¹ and revenue laws in private international law. The importance of the resolution on amendments to the Statute of the International Court of Justice (report of M. Max Huber) must be particularly emphasized. The Institute reaffirmed its proposals adopted at Siena on April 24, 1952, and made the following further suggestions. It urged that:

¹ See annexed text of resolutions below, pp. 82-83.

Without prejudice to the need for maintaining a certain geographical representation within the International Court of Justice as provided for in Article 9 of the Statute, judges of the Court should be elected primarily on the basis of their personal qualifications in accordance with Article 2.

It urged that the number of judges should not be increased, and that if some increase were necessary, the number should not exceed 18. It recommended that when several seats are to be filled, successive votes for each seat should be taken, though recognizing this method as incompatible with the present Statute. It urged that "with a view to reinforcing the independence of the judges," members of the International Court should be elected for 15 years and not be eligible for re-election; new members should be elected for 15-year terms, irrespective of the terms for which their predecessors held office. The Institute further recommended:

If the system of *ad hoc* judges cannot be abandoned, it would be in any case highly desirable that the appointment of such judges should be subject to guarantees as nearly as possible equivalent to those governing the election of titular judges. The appointment of such judges might, for instance, be entrusted to the national group of the Permanent Court of Arbitration of the State concerned, or to the national group appointed by the government in pursuance of Article 4, paragraph 2, of the Statute.

Finally, the Institute urged that Article 34 of the Statute be broadened to grant access to the Court "to international organizations of states of which at least a majority are Members of the United Nations or parties to the Statute of the Court."

Two new Commissions were appointed, dealing respectively with compulsory jurisdiction of international judicial and arbitral institutions, and with the principles involved in codification of the laws of war.

Furthermore the Institute took into consideration a proposal made by M. Kaarel R. Pusta (Estonia) to initiate a study on Nation and State, which notions do not always coincide in modern juridical and political conceptions, with the result that a divergence of law and legislation in various countries impairs the political status and civil rights of refugees and displaced persons, especially those from countries which are now under Soviet domination. A preliminary commission composed of Albert de La Pradelle, Kaarel R. Pusta and Edwin D. Dickinson is to work out this proposal.

The next session of the Institute will be held in Spain, under the chairmanship of the new President, M. José de Yanguas Messia, former Spanish Foreign Minister. M. Jean-Pierre François was designated First Vice-President for that session. Dr. Hans Wehberg, of the Institute of International Studies at Geneva, the Secretary General of the Institute of International Law, was unanimously reappointed to his office.

KAAREL R. PUSTA, SR.

ANNEX ²

DETERMINATION OF THE "RESERVED DOMAIN" AND ITS EFFECTS

(2nd Commission)

Article 1

The "reserved domain" is the domain of State activities in which the jurisdiction of the State is not bound by international law.

The extent of this domain depends on international law and varies according to its development.

Article 2

The expression "matters which are essentially within the domestic jurisdiction of States" has been used in order to delimit, in relation to the reserved domain, the competence of certain international organizations as determined by the constituent instrument of each of these organizations.

Article 3

The conclusion of an international agreement regarding a matter falling within the "reserved domain" precludes a party to the agreement from raising the plea of domestic jurisdiction in respect of any question relating to the interpretation or application of such agreement.

Article 4

The question whether, in a concrete case, the matter in dispute falls or does not fall within the reserved domain, is, in the event of controversy, eminently appropriate for decision by an organ having international jurisdiction.

Article 5

Any international organization may, within the limits of its competence, prepare international conventions relating to the reserved domain or make recommendations of a general character directed to Member or non-member States as a whole.

Article 6

With respect to a matter falling within the reserved domain, which gives rise to a dispute, other States and international organizations may facilitate attempts to reach an amicable agreement.

Voeu

The Institute of International Law expresses the hope that when a reservation in respect of matters of domestic jurisdiction is included in the declaration of acceptance by a State of the compulsory jurisdiction of the International Court of Justice, such State will leave it to the Court to decide in each particular case whether the reservation is applicable.

² Translation supplied by Dr. Pusta and published here with editorial revisions.

IMMUNITY OF FOREIGN STATES FROM JURISDICTION AND MEASURES OF EXECUTION
(1st Commission)

Article 1

The courts of a State have no jurisdiction to entertain actions concerning public acts of a foreign State, or of a legal entity of a foreign State.

Article 2

A State may waive its immunity.

A waiver of immunity may be express or tacit; in any case it must be unequivocal. The filing by a State of submissions on the merits shall constitute a waiver of immunity.

A State which appears as plaintiff, intervener or third party opposer before a foreign court shall be deemed to have submitted to the jurisdiction of the court.

A State cannot claim immunity from jurisdiction in respect of a counterclaim brought against it if the counterclaim is directly connected with the principal action, according to the law governing the latter.

Article 3

The courts of a State may entertain actions brought against a foreign State and the legal entities mentioned in Article 1 whenever the grounds of the action do not involve a public act.

The question whether an act is a public act shall be determined by the *lex fori*.

Article 4

The courts of a State cannot entertain actions against a foreign State relative to debts incurred by that State through a public loan in the territory of the State whose courts are seised of such actions.

The foreign State can, however, choose to submit to the jurisdiction of these courts.

Article 5

No forced execution or provisional attachment may be made upon property of a foreign State if such property is employed in governmental activity which is not connected with any economic undertaking whatever.

FOURTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW

Preceded by three earlier congresses of the kind (the first at The Hague in 1932, the second at the same city in 1937, and the third at London in 1950), the Fourth International Congress of Comparative Law met at the Faculty of Law of the University of Paris from August 1 to 7, 1954. Officially registered for the Congress were approximately two hundred fifty persons, including some thirty Americans. Participants included professors of law, professors of political science, and practitioners from

many countries. A considerable number of persons who did not attend contributed papers. The Congress met under the presidency of Dean Emeritus Roscoe Pound of the Harvard Law School, and there was a national committee for the United States, with Professor John Hazard of Columbia University as secretary; this committee had a ten-member subcommittee on public international law.

The program covered a broad scope and a diversity of topics. There were four sections. The first of these, labeled "General," included as subjects: The Law of Antiquity, Legal History, Canon Law, Legal Ethnology, Oriental Law, Legal Philosophy, The Study and Teaching of Law and Comparative Law and Unification. Subjects under Section II were Civil Law, Conflict of Laws, Civil Procedure, and Agricultural Law. Under Section III were grouped Commercial Law, Intellectual Property Rights, Labor Law and Air Law. Section IV included Public Law, Penal Law, and Public International Law. Under the last-mentioned subject were listed as particular topics: Limitations on National Sovereignty with Respect to Immigration and Naturalization, International Protection of Human Rights before National Tribunals, Foreign Economic Interests before National Jurisdictions, Political Systems and the International Community, The Impact of Agreements with Respect to the Organization of Europe on National Constitutions, Legislation and Administration, and International Regulation of Cartels and Monopolies.

At the opening (plenary) session of the Congress there were addresses by President Roscoe Pound of the Academy of Comparative Law, by Permanent General Secretary Élémer Balogh of the Academy, by Dean Julliot de la Morandière of the Faculty of Law of the University of Paris, by Judge Jules Basdevant of the International Court of Justice, and by Professor Emeritus Kenzo Takayanagi of the University of Tokyo. Discussions then proceeded in separate sections or panels, under a system of general reporters, the plan being sufficiently flexible to permit joint meetings of panels when this proved desirable.

The social occasions arranged for the Congress included one at which the members were guests of the Dean of the Faculty of Law of the University of Paris, also a reception by the City of Paris at the Hotel de Ville, and an evening's entertainment at Versailles.

R. R. W.

SURVEY OF RESEARCH IN PROGRESS ON THE MIDDLE EAST

The Middle East Institute is preparing for publication an annual Survey of Research in Progress on the Middle East. Its interests include the social sciences and appropriate aspects of related fields, including law, international law and the like. Geographical limits comprise the Arab countries, Israel, Turkey, Iran, Afghanistan, North Africa, the Sudan, Ethiopia and Eritrea.

The Institute requests that all engaged in research on the Middle East should submit to them the following information: name, address, topic of investigation, sponsoring organization (if any), estimated date of com-

pletion, and pertinent comment on the nature of the research, sources being used, and method of approach. Correspondence should be addressed to Mr. Harvey P. Hall, Survey of Research, The Middle East Institute, 1761 N Street, N.W., Washington 6, D. C.

W. W. B.

PRIZES IN INTERNATIONAL ORGANIZATION

The Carnegie Endowment for International Peace has announced an international prize competition for the best published and unpublished studies dealing with international organization. The purpose of the competition, which has been arranged by the European Center of the Endowment, is to encourage research by Europeans into problems of international organization, to help young scholars to have works published in this field, and to make generally available studies which might not otherwise be published. The Carnegie prizes will be awarded annually for a period of five years, beginning in 1955. The prize in the manuscript section of the contest will consist of a cash award of \$500 and publication at the Endowment's expense of the winning entry in an edition of at least 2,000 copies. The prize in the book section will comprise a cash award of \$1500. One honorable mention in each category will be awarded \$250.

The competition is open to persons who have not passed their fortieth birthday on July 1, 1955, and who are nationals of the United Kingdom, Eire, or of the countries of continental Europe. Manuscripts should not exceed 120,000 words. Published works should not exceed 350 printed pages. Entries may be written in English, French, Italian or German, and must be submitted in five copies not later than July 1, 1955, to the European Center of the Carnegie Endowment for International Peace, Route de Ferney 172, Grand Saconnex, Geneva, Switzerland.

E. H. F.

JUDICIAL DECISIONS

BY OLIVER J. LISSITZYN *

Of the Board of Editors

U. S. nationality—inability to return within statutory period

LEE WING HONG ET AL. v. DULLES. 214 Fed. (2d) 753.

U. S. Court of Appeals, Seventh Circuit, July 30, 1954. Major, C. J.

Plaintiff Lee Wing Foo, who was born in China in 1935 and claimed American nationality through father's citizenship, was denied in 1951, shortly before reaching the age of sixteen, an American passport on the ground that "the claims to identity were fraudulent." As a result, plaintiff was unable to enter the United States prior to his sixteenth birthday. A subsequent judgment declaring plaintiff to be an American citizen was affirmed. The court held that the passport was in effect denied on the ground that plaintiff was not a national and that the jurisdictional requirements for the action were thus met. It further held that the Nationality Act of 1940, which provided for loss of citizenship by a person in plaintiff's position if he did not return to the United States before reaching the age of sixteen, was applicable, rather than the 1934 Act which would have required him to return before reaching the age of thirteen; and that since plaintiff's return prior to his sixteenth birthday was prevented by defendant's failure to issue travel documents, he did not lose his citizenship.

NOTE: Cf. *Ling Share Yee v. Acheson*, 214 Fed. (2d) 4 (3d Cir., June 17, 1954); *Beltran v. Brownell*, 121 F. Supp. 835 (S.D. Cal., C.D., March 11, 1954); and *Junso Fujii v. Dulles*, 122 F. Supp. 260 (D. Hawaii, June 23, 1954). In *Tom Ming Ngow v. Dulles*, 122 F. Supp. 709 (Dist. Col., July 9, 1954), an action for a declaratory judgment to establish citizenship and right to enter the United States was held to lie under the Declaratory Judgment Act of 1934 and the Administrative Procedure Act of 1946 where the special remedy provided by the Immigration and Nationality Act of 1952, 8 U.S.C. § 1503, was not available. Actions for declaratory judgments to establish citizenship were held not abated by failure to substitute the new Secretary of State as defendant in *Lehman v. Acheson*, 214 Fed. (2d) 403 (3d Cir., June 18, 1954), and *Tom Wing Po v. Acheson*, 214 Fed. (2d) 661 (10th Cir., June 22, 1954). In *Petition of Acchione*, 213 Fed. (2d) 845 (3d Cir., June 10, 1954), the two-year period for return to the United States under Sec. 401(a) of the Nationality Act of 1940 was held to begin to run only after the citizen has acquired knowledge of his citizenship. For other cases concerning U. S. nationality see *Bruni v.*

* With the assistance of Mrs. Alma Suzin Flesch, made possible by Columbia University.

Dulles, 121 F. Supp. 601 (Dist. Col., May 13, 1954) (expatriation by voluntary acts abroad); *Augello v. Dulles*, 122 F. Supp. 329 (E.D.N.Y., July 14, 1954) (effect of certain acts in Italy); *U. S. v. Tarantino*, 122 F. Supp. 929 (E.D.N.Y., July 13, 1954) (revocation, by reason of dishonorable discharge, of citizenship acquired through service in armed forces is permissive, not mandatory); *Petition of Pringle*, 122 F. Supp. 90 (E.D. Va., Nov. 3, 1953); *Lue Chow Kon v. Brownell*, 122 F. Supp. 370 (S.D.N.Y., June 22, 1954); and *U. S. v. Casares-Moreno*, 122 F. Supp. 375 (S.D. Cal., C.D., June 21, 1954). See, further, *U. S. v. Tuteur*, 215 Fed. (2d) 415 (7th Cir., Aug. 19, 1954), and *Ex parte Zuniga*, 123 F. Supp. 379 (W.D. Texas, Aug. 19, 1954).

Naturalization—effect of exemption from military service

PETITION OF KUTAY. 121 F. Supp. 537.

U. S. Dist. Ct., S.D. Calif., Central Div., May 28, 1954. Tolin, D. J.

Petitioner entered the United States in 1939 as a student on a Turkish passport, married an American citizen in 1943, returned to Turkey in 1946, came back in 1948 and was admitted for permanent residence as of 1939 by an Act of Congress. He had two children born in the United States. During his stay in the United States as a student, petitioner was under the strict supervision of Turkish authorities. In 1944, at the specific direction of the Turkish Consul, he applied for and obtained exemption from military service. The court held that petitioner was not debarred from citizenship by Section 315 of the Immigration and Nationality Act of 1952, since he had applied for exemption from military service in the belief that he had no free choice in the matter. The court, in part, said that:

it is apparent that petitioner did not have the opportunity to make an intelligent election. He was an alien under allegiance to a foreign, neutral government, temporarily in this country for a limited purpose. His action was on direction of his sovereign. He was under obligation to obey that sovereign. International law might well require our Government to respect petitioner's loyalties to his sovereign.

NOTE: In *In re Manderli*, 122 F. Supp. 241 (N.D. Fla., June 28, 1954), it was held that a Swiss national who claimed and obtained exemption from military service in 1942 under the treaty of 1850 with Switzerland was debarred from American citizenship by Section 315 of the Immigration and Nationality Act of 1952, even if not debarred by the Selective Training and Service Act of 1940. A statement by an enemy alien in 1942 in a Selective Service questionnaire that he objected to service in United States armed forces was held not to be an "application" for exemption from such service and not to render him permanently ineligible for citizenship. *Petition of Zumsteg*, 122 F. Supp. 670 (S.D.N.Y., July 23, 1954).

A petitioner for naturalization who had cohabited with another man's wife was held to have failed to establish his good moral character, *Petition of McNab*, 121 F. Supp. 939 (E. D. La., June 7, 1954); but unlawful entry of a building, of which the petitioner had been convicted, was held, under the circumstances of the case, not to be a crime involving moral turpitude

and precluding naturalization, *Petition of Knight*, 122 F. Supp. 322 (S.D. N.Y., July 22, 1954).

Sovereignty over Okinawa—Treaty of Peace with Japan—nationality

UNITED STATES v. USHI SHIROMA. 123 F. Supp. 145.

U. S. Dist. Ct., D. Hawaii, Aug. 12, 1954. McLaughlin, C. J.

Defendant, a native of Okinawa who had resided in Hawaii since 1913, was charged with failure to notify the Attorney General of his current address and to furnish other information required of aliens under 8 U.S.C. § 1305, and was adjudged guilty. The court rejected his contention that Okinawa had become a possession of the United States and that consequently he was a United States national. Noting that the term "national of the United States" was defined by statute to include a person who owes permanent allegiance to the United States, the court declared that whether defendant owed such permanent allegiance depended on whether American sovereignty extended over Okinawa. Pointing out that prior to the Treaty of Peace with Japan¹ it had been held that Okinawa was not under the *de jure* sovereignty of the United States, the court went on to say:

Our concern is solely with "de jure sovereignty," because only this time-tested yardstick of international law should be applied in determining the status of a geographical area and its inhabitants. In other words, permanent allegiance is owed only to a "de jure sovereign."

The pertinent part of the Treaty of Peace is Article 3, which reads as follows:

"Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nampo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."

The defendant baldly contends that under Article 3 the United States acquired sovereignty over Okinawa, Ryukyu Islands. To this, the Court cannot subscribe.

Sovereignty over territory may be transferred by an agreement of cession. See 1 Hackworth, *Digest of International Law* 421 (1940). Here neither in Article 3 nor in any other article of the Treaty of Peace does Japan *cede* Okinawa to the United States. In Article 2, Japan formally "renounces all right, title and claim" to certain specified territories, including Korea, Formosa and the Kurile Islands. However, there is no such renunciation as to territories named in Article 3.

¹ U. S. Treaties and Other International Acts Series, No. 2490; this JOURNAL, Supp., Vol. 46 (1952), p. 71.

On September 5, 1951, John Foster Dulles, who as a consultant to the Secretary of State was instrumental in negotiating the treaty, made a speech at the Conference for the Conclusion and Signature of the Peace Treaty with Japan. See 25 Dept. State Bulletin 452-9 (1951). At that time, Mr. Dulles in explaining the principal provisions of the treaty made the following statement:

"Article 3 deals with the Ryukyus and other islands to the south and southeast of Japan. These, since the surrender, have been under the sole administration of the United States.

"Several of the Allied Powers urged that the treaty should require Japan to renounce its sovereignty over these islands in favor of United States sovereignty. Others suggested that these islands should be restored completely to Japan.

"In the face of this division of Allied opinion, the United States felt that the best formula would be to permit Japan to retain *residual sovereignty*, while making it possible for these islands to be brought into the U.N. trusteeship system, with the United States as administering authority." (Emphasis added.) Id. at p. 455.

The reasonable construction of treaty terms by the State Department, acquiesced in by the other signatory powers, is entitled to great weight. . . . Thus Mr. Dulles' construction of Article 3, as opposed to defendant's contentions, is very persuasive.

Furthermore, to the Government's reply brief is attached a copy of a letter dated May 14, 1952, addressed to a Mr. Overton from the Legal Adviser of the Department of State.

The letter states in part as follows:

"1. A legal opinion is requested on the request of the Japanese Vice Minister for Foreign Affairs dated 10 December 1951, that the United States confirm that the 'Southern Islands' (the Ryukyus and the Bonins) remain under the sovereignty of Japan and that their inhabitants remain Japanese nationals.

* * * * *

"6. It is concluded that sovereignty over the Ryukyu and Bonin Islands remains in Japan, and that the inhabitants thereof are Japanese nationals."

"Residual sovereignty" referred to by Mr. Dulles is a concept difficult to define. The defendant analogizes "residual sovereignty" to a "future interest" and conceives it to mean that sovereignty is to arise *in futuro*. Therefore, he argues, under Article 3, "present sovereignty," the antithesis of "residual sovereignty," is in the United States, making him a "national." However, under the law of property, a holder of a "future interest" presently has a bundle of rights, privileges and duties, although the right of possession or enjoyment is postponed until the future. . . . Moreover, the importation of the niceties from the law of property into the field of international law confuses rather than aids in resolving the instant problem. . . .

The adjective "residual" means of the nature of something left as residue. Thus the concept of "residual sovereignty" starts with the assumption that sovereignty is capable of division.

Under Article 3 of the Treaty of Peace, Japan which previously had full sovereignty over Okinawa transferred a part of that sovereignty, while retaining the residue. That portion of the sovereignty which gives the United States "the right to exercise all and any powers of administration, legislation and jurisdiction" under Article 3 may

be labeled "de facto sovereignty." The residue or "residual sovereignty" retained by Japan is the traditional "de jure sovereignty." What the situation will be when the United States, under Article 3, makes a proposal to the United Nations to place Okinawa under its trusteeship system and affirmative action is taken thereon is not presently material.

Japan, and not the United States, having "de jure sovereignty" over Okinawa since the ratification of the Treaty of Peace, the defendant is not a national of the United States.

NOTE: On sovereignty within the United States see *Adams v. Londeree*, 83 S.E. (2d) 127 (Sup. Ct. of Appeals of West Virginia, April 2, 1954).

Effect of war on treaties—tax exemption of enemy government property

BROWNELL v. CITY AND COUNTY OF SAN FRANCISCO. 271 Pac. (2d) 974.

Calif., Dist. Ct. App., 1st Dist., Div. 1, June 21, 1954. Fred B. Wood, J.

The Attorney General of the United States, as successor to the Alien Property Custodian, sued for the recovery of taxes for the years 1941-1948 paid, under protest, on real property owned by the German Government from April, 1941, to September, 1947, when title was vested in the United States. The property was used as the German Consulate General until about July 14, 1941, when by Executive Order all German consulates in American territory were closed. The property then remained in charge of a caretaker until the outbreak of the war with Germany when the Swiss Consulate took over its supervision. In June, 1945, control was assumed by the Department of State under a protocol with Switzerland. Until the vesting in September, 1947, various equipment, furniture, materials and records were stored on the premises.

Plaintiff relied on Article XIX of the Treaty of December 8, 1923, with Germany, which exempted from taxation the lands and buildings of either party situated in the territory of the other if "used exclusively for governmental purposes by that owner."¹ Affirming a judgment for plaintiff, the court said:

(1) *Was this tax exemption provision of the treaty suspended or abrogated by the declaration of war between Germany and the United States in December, 1941?*

Not necessarily, for it has already been determined that a clause of this treaty which accords to the nationals of each country the right to inherit real property in the territory of the other was not suspended or abrogated by that declaration of war nor by the hostilities which ensued. *Clark v. Allen*, 331 U. S. 503. . . .

It does not appear that exempting the "lands and buildings" of either nation from taxation by the other is so incompatible with the maintenance of a state of war as to require an inference that the contracting parties intended the abrogation or suspension of such exemption during time of war.

¹ 44 Stat. 2132.

How could the use¹ made of this property during 1941-1947 and the tax exemption of property so used interfere with or impair our war effort? Continued recognition of such exemption would seem no more incompatible with the maintenance of war than was our continued recognition of Germany as the owner of this property. Nor does continued recognition of such ownership and the attendant tax exemption seem any more incompatible with a state of belligerency than the right of inheritance accorded nationals of the respective contracting parties by article IV of the same treaty. It is important to bear in mind the reciprocal aspect of this tax exemption. It is of equal benefit to the respective contracting parties. The United States benefits from the tax exemption of its "lands and buildings" in Germany just as does Germany benefit from the tax exemption of its "lands and buildings" in this country. That interest conceivably is as important in time of war as in time of peace, to the United States as well as to the German government.

Persuasive of this view is the attitude of our State Department, expressed in three communications to our Department of Justice. "The Department of State is of the view that the legal effect of these provisions [that portion of article XIX of the treaty hereinabove quoted] was unchanged by the outbreak of war between the United States and Germany. This view is in complete accord with the policy long followed by this Government, both in time of peace and in time of war, with regard to property belonging to the government of one country and situated within the territory of another country. This Government has consistently endeavored to extend to the property of other governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty. This Government, likewise, has been equally diligent in demanding that other governments accord such recognition and rights to its property in their territories.

"The history of this Government's treatment of the German diplomatic and consular properties in the United States following the outbreak of war between the United States and Germany may be of interest in connection with this matter. . . .

"In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien Property is advancing that the provisions of the second paragraph of Article XIX of the treaty . . . with Germany remain in effect despite the outbreak of war between the United States and Germany." . . .²

Defendant's argument which leads it to the conclusion that the tax exemption clause under consideration was suspended when war was declared, depends principally upon an erroneous assumption that the exemption was given solely to facilitate the performance of consular functions and ceases to operate during any period of cessation or suspension of consular activities. That is too narrow an interpretation. . . .

This reciprocal tax exemption clause bears no such relation to the active conduct of consular affairs by either of the contracting parties

¹ [Footnote omitted.]

² We take judicial notice of this communication from the Secretary of State to the Attorney General as an official act of an executive department of the United States government. . . . Courts take judicial notice of treaties and their interpretation by the judicial and the executive branches of government. . . .

as would warrant an inference or give rise to a presumption that the parties intended its suspension during the suspension of the active conduct of consular affairs by either of them. . . .

The court went on to consider the question whether the tax exemption provision had been suspended or abrogated by Congressional enactment or by Presidential or other executive action incompatible with its enforcement, and, after examining the provisions of the Trading with the Enemy Act and governmental action, answered the question in the negative, concluding that the Act and the Executive Orders did not evince such hostility to the tax exemption as to imply that its continued recognition conflicted with national policy.

The court further held that the evidence supported the finding that until the vesting order in 1947 the property was used by the German Government for governmental purposes, saying in part:

We are persuaded that the custodial and protective care given this property throughout the period in question was a "use" of that property, and that such use was for a "governmental purpose." . . . [It] was probably the maximum "use" that could be made of it by the owner during that period. The preservation of the property, whether in the hope of again using it as a consular office or for a residence for the consul or for ultimate sale, would seem clearly to be a "use" of it and a use for "governmental purposes."

This was also a use by the "owner," the German government; directly so until shortly after war was declared, then through the medium of the Swiss government and later through the medium of our Department of State.

Persuasive of these conclusions are the views expressed by our State Department in its communication of May 24, 1951, to the Attorney General of the United States . . . : ". . . An interpretation which limited the application of the provision to property used exclusively for consular purposes, or to property used only as a consular office, and not as a residence for the Consul General as well, would not be in accord with this Government's interpretation of the provision or with the evident intent of the negotiators of the German treaty.

"As you are no doubt aware, this Government has had occasion to acquire sizable amounts of property abroad to be used as embassies, legations, consulates, and other governmental establishments. In many foreign countries the United States has found it necessary or desirable to purchase or otherwise acquire property for use as residences of employees of this Government stationed abroad. It would appear that a restrictive interpretation by a court in the United States of the meaning of the phrase 'used exclusively for governmental purposes' would have an adverse effect upon the status of property owned by the United States abroad. The Department might thereafter be precluded from contending that many pieces of such property were used by the United States for governmental purposes, and should, therefore, be exempt from taxation. . . ."

Proceeding to examine the question whether the tax exemption terminated when title was vested in the United States, the court held that Section 36 of the Trading with the Enemy Act concerning taxation of vested property did not "by its terms render applicable any tax which is otherwise

inapplicable," and that there was no city or county tax "incident to" the property here involved in view of the treaty provision. The court concluded, apparently, that the statute did not render inapplicable to this property the general rule that property of the United States is exempt from taxation.

Foreign act of state—effect in American courts

FRAZIER v. FOREIGN BONDHOLDERS PROTECTIVE COUNCIL. 133 N. Y. Supp. (2d) 606.

N. Y. Sup. Ct., Special Term, N. Y. County. Rabin, J.

After the dismissal of the suit brought by plaintiff bondholders on the ground that the court cannot sit in judgment on the acts of a foreign sovereign,¹ plaintiffs added some counts to their complaint charging defendants with dereliction in the performance of their services on behalf of plaintiffs.

Defendants' motion for summary judgment was granted. The only remaining issue, the court said, was whether the alleged repudiation by Peru of its obligation was "contrary to our public policy and shocking to our sense of justice and equity." The court held that it was not, for the following reasons:

1. If the challenged act of Peru reached only property in Peru but not in New York "serious doubts might arise as to the competency of our courts even to consider the compatibility of that act with our public policy."

2. Before a sovereign may be charged with breach of contract "the obligation alleged to have been impaired must be clearly and unequivocally expressed." Plaintiffs' construction of the obligation incurred by the Peruvian offer of 1947 was not clearly expressed.

3. Since the United States Constitution bars only States from impairing the obligations of contracts, "it is not clear how far any impairment of the obligations of a contract can be deemed 'shocking' especially where, as here, it involves, in that view most favorable to plaintiff's position, preferential treatment of a class of creditors, which in appropriate circumstances, is allowable as a matter of due process." The determination by Peru that its obligation runs to one of two competing classes of bondholders "does not disturb even the most sensitive conscience or morality."

International aviation—Warsaw Convention

AMERICAN SMELTING & REFINING CO. v. PHILIPPINE AIR LINES. N. Y. Law Journal, June 21, 1954, p. 6.

N. Y. Sup. Ct., Special Term, N. Y. County, Part X. Wasservogel, Spec. Referee.

Plaintiff delivered to defendant in California gold for consignment in Hong Kong. The airplane carrying the gold from California made several stops for refueling before landing in Manila. There the cargo was trans-

¹ This JOURNAL, Vol. 48 (1954), p. 333.

ferred to another of defendant's airplanes which proceeded non-stop to Hong Kong. In attempting to land, the airplane crashed and some of the gold was lost. Plaintiff sued to recover its value.

Defendant relied on Article 20 of the Warsaw Convention¹ which exempts the carrier from liability if he took all the necessary measures to avoid the damage or if it was impossible to do so, or if the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation. Plaintiff contended that defendant violated Article 8 of the convention which requires the air waybill to show the agreed stopping places, since there was no listing of the stop at Manila or of the previous refueling stops. Accordingly, defendant was liable to the full value of the goods under Article 9 of the convention which provides that a carrier "shall not be entitled to avail himself of the provisions which exclude or limit his liability" if he accepts goods for carriage without a proper air waybill as set forth in Article 8.

The court gave judgment for defendant, saying that treaties must be

reasonably and liberally construed so as to carry out their obvious purpose. . . . The authorities seem to be in unanimous agreement that the purpose of article 8, subdivision (c), is to put the passenger or consignee on notice of the international character of the flight and the applicability of the Warsaw Convention *where the places of departure and destination do not themselves indicate such facts*. . . . If the agreed carriage is between two Contracting States, there is no need to insert an agreed stopping place in order to establish that the carriage is "international."

Sovereign immunity—acts of government officials

JOHNSON v. TURNER. Decision L. J., Vol. 10 (1954), p. 389.

Philippine Supreme Ct., April 26, 1954. Montemayor, J.

Plaintiff, an American citizen and former employee of the United States Army at Okinawa, came to the Philippines as a civilian, bringing with him some Military Payment Certificates (scrip) which he claimed to have earned in Okinawa. Five months later he went to the United States Military Port of Manila and tried to convert the scrip into United States dollars, allegedly for the purpose of sending the money to the United States. The Provost Marshal of the Military Port confiscated the scrip, claiming that plaintiff was keeping it in violation of military circulars, rules and regulations. Upon rejection of his claim for return of the scrip, plaintiff brought suit against the Commanding General, Philippine Command, USAF, and the 13th Air Force, USAF, and other United States officers. A judgment for plaintiff was reversed on appeal and complaint dismissed on the ground that the Philippine courts had no jurisdiction. The court indicated that if the action had been merely to recover property illegally withheld by government officers and agents, the result might be different, but here the action was for the amount of the old scrip in scrip of a new series, old scrip being now valueless unless converted. Further-

¹ 49 Stat. 3000.

more, the court said, since plaintiff had lost authorized status to possess and use scrip, he would have to be given the equivalent in dollars. Therefore, the claim and judgment would be a charge against, and a financial liability of, the United States, since defendants had undoubtedly acted in official capacities and had left the Philippines. Since the United States had not consented to be sued, there was no jurisdiction.

Enemy property controls—effect of U. S. law in the Philippines

BROWNELL v. SUN LIFE ASSURANCE CO. OF CANADA. Decision L.J., Vol. 10 (1954), p. 608.

Philippine Supreme Ct., June 22, 1954. Labrador, J.

Petitioner, the Attorney General of the United States, sought to collect the proceeds of a life insurance policy payable to a Japanese national. The court, affirming a judgment for petitioner, held that the United States statute enacted on July 3, 1946, and known as the Philippine Property Act of 1946, was fully effective in the Philippines after the latter became independent on July 4, 1946, by virtue of consent to its application clearly implied in the acts of the Executive Department of the Philippine Government and in the enactments of the Philippine Congress. The court indicated that without such consent the United States Act would not be effective in the Philippines, but pointed out that international law does not require any special form for agreements between states. An express provision in the United States Act, the court also held, fully protected the respondent from any further liability for the amount ordered to be paid to petitioner.

Diplomatic immunity—waiver by appearance

CASE OF GREY. Journal du Droit International (Clunet), Vol. 80 (1953), p. 887.

France, Ct. of Appeal of Paris, April 16, 1953.

In a divorce action it was held that an attaché of a foreign embassy effectively waived his diplomatic immunity by appearing and pleading without reserving his position. A judgment by default could, therefore, be given against him on appeal. (A note by J. B. Sialelli is appended to the report.)

International aviation—Warsaw Convention

HENNESSY v. COMPAGNIE AIR FRANCE. Rev. Générale de l'Air, Vol. 17 (1954), p. 80.

France, Ct. of Appeal of Paris (1st Ch.), Feb. 25, 1954.

In an action by surviving relatives for damages growing out of the death of a passenger in an airliner which crashed in the Azores, the court, referring to the provisions of the Warsaw Convention¹ and its general purpose, rejected on appeal plaintiffs' contention that, not being parties to the contract of carriage, they were not bound by the limitation on the

¹ 49 Stat. 3000.

amount of liability prescribed by the convention, but could sue the carrier for damages on the basis of delictual liability without regard to such limitation. The court also interpreted the meaning of "*faute lourde*" as an equivalent in French law of "*dol*," specified in the convention as the basis of unlimited liability, and found that the carrier was not guilty of a *faute lourde*. (A critical note by Paul de la Pradelle is appended to the report.)

Military government in Germany—nature and effect—restitution

DRUCKEREI UND VERLAGSGESELLSCHAFT M.B.H. v. SCHMIDTS. Rev.

Critique de Droit International Privé, Vol. 43 (1954), p. 145.

Germany, French Zone, Superior Restitution Court of Rastatt (Franco-German Cassation Jurisdiction), Feb. 15, 1952.

In an action for restitution of a rotary press which had been transferred from claimants under the Nazi regime in what later became the French Zone, but which was now found in the British Zone, it was held that, by virtue of ordinary rules of conflict of laws, Ordinance No. 120 concerning restitution in the French Zone, rather than Law No. 59 governing restitution in the British Zone, was applicable. The court expressed the opinion, however, that the French Zone restitution courts were competent to apply Law No. 59 in appropriate cases, subject to the requirements of *ordre public*. In the course of its reasoning, the court indicated that Germany had not ceased to exist as an entity in public law, and that the Allied Zone commanders legislated in two distinct capacities as exercising the supreme powers of German government and as exercising rights of military occupants (even *cessante bello*). The exercise of the latter was subject to international law and Article 43 of the Hague Convention. Since restitution laws were not necessary for the security of the occupation troops or for the maintenance of public order, and had no military aspect, they had been enacted in the exercise of German legislative powers and regulated private law relations within the general framework of German law. The court, therefore, regarded principles of private international law applicable by analogy. (A note by Henri Motulsky is appended to the report.)

Jurisdiction over war crimes—reprisals—Geneva Conventions of 1949

CASE OF KAPPLER. Rivista di Diritto Internazionale, Vol. 36 (1953), p. 193.

Italy, Supreme Military Tribunal, October 25, 1952.

Defendant, an ex-member of the German armed forces, was captured by the Allies and turned over to Italy for trial for mass slaughter of civilians. Defendant's first objection was that, being a prisoner of war of the British, he could not be tried by Italy for offenses committed before his capture. This objection was rejected on the authority of the *Wagner* case¹ and

¹ Giurisprudenza Completa della Corte Suprema di Cassazione, Sez. Penale, 1950, III, p. 30 (Oct. 28, 1950).

other decisions. Defendant also relied on Article 85 of the Geneva Convention of 1949 on Prisoners of War² which provides:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

Defendant contended that since this provision entitled him to the benefits of the convention even in case of prosecution under the laws of the detaining Power, still less could he be delivered to another state. The court, however, without deciding whether the convention was applicable to a German soldier taken prisoner in World War II (Germany not being a party to the convention and being, since the end of the hostilities, in a peculiar international legal situation), was of the opinion that crimes against the laws and usages of war were outside the scope of Article 85. The modern view of the treatment to be accorded prisoners of war, the court said, contemplates the protection of those who have observed the laws and usages of war, but not a privileged status for those who had violated such laws and usages before capture. All four conventions concluded at Geneva in 1949 regard certain acts as serious infractions and require each contracting party to punish those who commit such infractions or to turn them over to another contracting party for punishment. It is significant that Article 146 of the 4th Geneva Convention requires that the accused be accorded procedural safeguards not inferior to those required by Article 105 *et seq.* of the convention which deals with the treatment of prisoners of war. The court added that its conclusion was supported by the language of Article 85 itself, which speaks of prosecution "under the laws of the Detaining Power." This language does not embrace the offenses here charged which are crimes against international law. This fact becomes evident when Article 85 is compared with Article 99 of the same convention which speaks of acts forbidden by the law of the detaining Power or by international law.

Defendant also pleaded that the act committed by him was a legitimate act of reprisal for an attack made in that locality against members of the German armed forces. Without deciding whether the right of reprisal is limited by the principle of proportion between the hostile act and the reprisal, the court was of the opinion that the hostile act was committed by persons who did not have the quality of legitimate belligerents. With respect to persons who commit such acts and, in some cases, with respect to the population of which such persons form part, international law provides a series of possible measures, including denial of the protection accorded to legitimate belligerents in case of capture, application of penal sanctions, and collective sanctions. All of these measures are characterized by respect for the principle of justice which requires that the innocent should not be made to pay for the guilty. Even though permissible collective sanctions presuppose a rather broad concept of guilt, they do not include the taking of life (Article 50 of the Hague Regulations). The

² This JOURNAL, Supp., Vol. 47 (1953), p. 119.

court was not impressed by references to contrary provisions in the military regulations of some states, which do not include Italy. The legitimacy of such provisions is debatable, and in any case even in the opinion of those who regard them as applicable, the legitimacy of their application is subject to numerous conditions which were not present in the instant case. (The court referred to the case of Keitel before the International Military Tribunal of Nuremberg and the case of List before an American tribunal.) The new Geneva Conventions contain strict prohibitions of reprisals, but it is sufficient to show that in this case the act of reprisal was prohibited by international law in force at the moment of its commission. The court added that in this case the act of reprisal also could not be justified as a reaction against the illegal conduct of the enemy state, since the hostile act had been committed by persons operating at their own risk and not belonging to the Italian armed forces, regular or auxiliary.

The court also held that Article 87 of the Geneva Convention, which calls for the mitigation of punishments to be inflicted on prisoners of war, since the latter owe no allegiance to the detaining Power, does not apply to crimes committed before capture. (A note by Roberto Ago is appended to the report of this case.)

Sovereign immunity—character of activities

FLORIDI *v.* SOVEXPORTFILM. *Foro Italiano*, 1952, I, p. 796.

Italy, Tribunal of Rome, November 15, 1951.

An action was brought by an Italian citizen against Sovexportfilm, a Soviet company, arising out of an employment relationship. The court addressed itself to the question of jurisdiction over defendant and concluded that it had jurisdiction. Sovexportfilm, the court said, could not be deprived of its right to exemption from jurisdiction, if any existed, by the mere fact that under Soviet law it is a public entity having a personality distinct from that of the state. A larger view of state organization may be taken under international law than is taken under internal law, so that a public entity may be considered part of the government both for the purpose of exemption from jurisdiction and for the purpose of imputability of its acts to the state.

With respect to the question whether jurisdiction may be exercised over Sovexportfilm in a cause of action arising out of the latter's commercial activities, it is an oversimplification, the court thought, to say that such activities must be considered public because under Soviet law commerce is a monopoly of the state. The definitions of the terms "public" and "private" in international law do not depend on any particular body of internal law. The meaning of these terms is that usually given to them by the community of states. Where, as here, the opinions of the states differ, there is no objective standard in international law. To make a decision possible in such a case, the court must rely on the principle of good faith which permits the judge to consider the internal law of the

forum and of the foreign state, as well as other factors, not as authority, but purely for their logical application to the question.

In accordance with the above criteria, the court held that Sovexportfilm was not exempt from jurisdiction for the following reasons: (1) Commercial activities are considered public only in socialist states and not in any other; the Italian state is among the latter. (2) The exercise of jurisdiction in this case would not undermine the independence of the Soviet state. (3) Sovexportfilm indirectly admitted that it was not entitled to immunity from Italian jurisdiction when it considered valid, as applied to it, the collective contracts covering the class of workers to which plaintiff belongs.

NOTE: In upholding the validity of a judgment against the Soviet Trade Delegation in an action commenced before World War II, the Court of Appeal of Milan, Italy, held that the identity of the Delegation as a party was preserved despite the intervention of war between Italy and the U.S.S.R., since the Delegation was an organ of the Soviet state which could not be suppressed by Italian law, even though before 1941 (under a treaty of 1924) the Delegation enjoyed diplomatic immunity as a public entity while now it acted only *jure privatorum*. *Rappresentanza Commerciale dell'U.R.S.S. v. Borgia*, Jan. 15, 1952, *Foro Padano*, 1952, I, p. 696.

Sovereign immunity—diplomatic immunity—character of activity

CASTIGLIONI v. FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA. *Foro Italiano*, 1952, I, p. 796.

Italy, Tribunal of Rome, January 28, 1952.

A complaint was filed against the Yugoslav Republic residing in Belgrade. Notice was sent to the President of the Federal Government of Yugoslavia and to the Yugoslav Minister Plenipotentiary accredited to Italy. The latter protested to the Minister of Foreign Affairs that to subject Yugoslavia to the jurisdiction of the Italian court would constitute a violation of international law recognized by all civilized nations. This protest was transmitted to the court, which, therefore, examined all the elements of jurisdiction.

The first conclusion reached was that both notices sent were effective for the purpose of *legitimatio ad processum*. According to Article 82 of the Yugoslav Constitution of 1951, "the President of the federal government represents the government." There is, therefore, no doubt that the President is authorized to represent the Yugoslav state in this controversy.

The question whether the diplomatic agent is qualified to represent his state in a litigation arising under private law, is more troublesome, the court said. While there is no settled doctrine with respect to this question, the court felt that an affirmative answer would not be inconsistent with the functions of a diplomatic agent or with the special prerogatives which he enjoys. The functions of the diplomatic agent are manifold and not clearly circumscribed by international law. There is every reason to extend his activities beyond the political field, especially today when the

activities of states in their private capacity are widespread and when the prevalent doctrine regards the state as one inseparable personality without distinction between public and private activities. This conclusion is consistent with the rules governing the immunity of diplomatic agents. The state to which an agent is accredited must not interfere with the fulfillment of the agent's functions. For this reason, immunity from jurisdiction attaches to the agent as a person and not as an organ of his state. Where the agent is summoned to answer for acts done in his official capacity, the question of jurisdiction no longer involves diplomatic immunity but the ability of a state to exercise jurisdiction over another state.

The court then addressed itself to the question of jurisdiction over Yugoslavia. Italian jurisprudence, it said, had long held that while exemption from jurisdiction is complete where the foreign state engages in public activity, there is no exemption with respect to activities of a private nature. No rule of international law forbids such a view, since none has been clearly established, several European states following the Italian view, and the Anglo-Saxon countries granting total immunity.

NOTE: An injunction against Yugoslavia was denied by the Tribunal of Milan, Italy, on the ground that Italian law does not provide for injunctions against persons resident abroad. The presence of a Yugoslav ambassador in Rome is not sufficient, since he has extraterritoriality and cannot be regarded as manager of his country's property interests. The juridical person called Yugoslavia resides entirely and exclusively abroad. *Case of Castiglioni*, March 26, 1951, Foro Padano, 1951, p. 511. Cf. *Lagos Carmona v. Baggianini*, below.

The Supreme Court of Argentina held immune from its jurisdiction the Polish Legation. Article 24 of the Argentine Constitution of 1949 provides that no suit shall be entertained against a foreign state if the latter, in response to a request made to its diplomatic representative through the Ministry of Foreign Affairs, does not consent to the jurisdiction of the court. *Caja Nacional de Ahorro Postal v. Legacion de Polonia*, Sept. 29, 1952, *Journal du Droit International (Clunet)*, Vol. 81 (1954), p. 228.

The Republic of Indonesia was held immune from the jurisdiction of the Netherlands courts by the Court of First Instance of The Hague in *Miga v. State of the Netherlands et al.*, April 13, 1953, *Nederlands Tijdschrift voor Internationaal Recht*, 1953-1954, p. 328.

Diplomatic immunity—servants

CASE OF MOHAMMED LAJED AHMED. *Annali di Diritto Internazionale*, Vol. IX (1951), p. 185.

Italy, Rome, Praetor's Ct., May 22, 1951. Milanese, Praetor.

Defendant, servant of a foreign diplomatic representative, was accused of running over a person while driving a vehicle. When the accident occurred, defendant was not engaged in the performance of his duties. The defense relied on diplomatic immunity. The court rejected the claim to immunity for the following reasons:

After the abandonment of the fictional and irrational theory of ex-

territoriality, the exemption of diplomatic agents from the jurisdiction of the state was recognized because the exercise of such jurisdiction would violate the rights of sovereignty of the agent's government and would impede the performance of his functions. While, on this theory, it is illogical to extend immunity to the unofficial acts of the diplomatic agent, such immunity is nevertheless granted because of the difficulty of deciding which acts are official. Domestic servants, however, do not enjoy personal immunity from jurisdiction. They are exempt only by virtue of their relation to the diplomatic agent and the exemption accorded to them is not from the jurisdiction of the state but merely from personal coercion. There is no reason for any greater immunity since domestic servants are not representatives of a foreign state and since freedom from personal coercion is sufficient to insure to the foreign legation the service necessary for its functioning. While the publicists disagree on this question, the latest doctrine holds that the receiving state has the duty to accord to domestic servants certain immunities, but may determine for itself whether it will interpret this duty strictly or liberally. This view is in accord with the actual enactments of the various states with respect to this question. Except for the American law of 1790 and the Austrian penal code of 1804, there is no provision for total immunity of domestic servants. The Statute of Anne, often cited in support of total immunity, provides only that domestic servants cannot be arrested and their goods cannot be seized. A London court held that this law protects only from coercive power and does not amount to immunity from jurisdiction. Similarly, the International Organizations Immunities Act of the United States contemplates immunity from suit and legal process only with respect to acts of officials in their official capacity and within the scope of their authority.

Diplomatic immunity—unofficial acts

LAGOS CARMONA *v.* BAGGIANINI. *Rivista di Diritto Internazionale*, Vol. 37 (1954), p. 111.

Italy, Tribunal of Rome, March 24, 1953.

Holding the Third Secretary of the Chilean Embassy immune from suit for damages resulting from an automobile collision, the court rejected the view that diplomatic immunity properly applies only to the unofficial acts of diplomatic agents, while for official acts the immunity enjoyed by the agent is the same as that of his state. The modern rationale of diplomatic immunity is expressed in the principle *ne impediatur legatio*, which explains the wide application of diplomatic immunity. The latter is also explained by (1) the difficulty of distinguishing official from unofficial acts; (2) the dissimilarity in the conditions of civilization in the various states; and (3) the desire to avoid any disturbance on the international scene which would arise out of coercive action against diplomatic agents. That a rule of international law exempting diplomatic agents from civil jurisdiction over unofficial acts exists, is shown by treaties and by internal enactments of various states.

Diplomatic immunities—administrative personnel

SOC. ARETHUSA FILM v. REIST. *Rivista di Diritto Internazionale*, Vol. 37 (1954), p. 114.

Italy, Tribunal of Rome, July 13, 1953.

Defendant, Chancellor at the United States Embassy in Rome, was held subject to the civil jurisdiction of the Italian courts with regard to his unofficial acts. The court said that for the administrative personnel as well as for diplomatic agents the question of exemption arises only with respect to unofficial acts, since the imposition of responsibility for official acts would involve the foreign state itself. The exercise of jurisdiction over diplomatic agents in cases arising out of their private acts would impair that liberty of action which must be granted to them for the protection of the interests of their state. On the other hand, administrative officials perform bureaucratic functions which will not be impeded by the exercise of jurisdiction with respect to private acts. This view finds support in the agreements dealing with this question. While total immunity is always granted diplomatic agents, the agreement between the League of Nations and the Swiss Federal Council, as well as that between Rumania and the European Danube Commission, provided that the administrative personnel were to remain subject to the jurisdiction of the state for unofficial acts. Thus, not only is there no rule which requires the granting of the exemption sought by defendant, but there appears to be a rule to the contrary. The fact that the United States grants total immunity to administrative personnel of foreign embassies on a basis of reciprocity is immaterial, since Article 10 of the Italian Constitution requires the court to follow the rules of customary international law, and since there is no agreement on this subject between Italy and the United States. (A note by Antonio Malintoppi is appended to the report of this case.)

Immunities of international organizations—I.R.O.

VIECELLI v. I.R.O. *Rivista di Diritto Internazionale*, Vol. 36 (1953), p. 470.

Tribunal of Trieste, July 20, 1951.

Plaintiff was employed by the International Refugee Organization and sued the latter on a cause of action arising out of the contract of employment. Defendant contested the jurisdiction of the court, claiming sovereign immunity as an autonomous international entity. It contended that the controversy should have been submitted to arbitration as provided by the I.R.O. personnel regulations. Plaintiff argued that the I.R.O. does not have sovereign immunity, and that, in any event, a contract of employment involving a modest position (that of interpreter and interviewer of refugees) constitutes private activity in regard to which a sovereign is subject to Italian jurisdiction.

The court upheld defendant's objection to its jurisdiction. It said that while the United Nations has international juridical personality, the insti-

tutions created by the United Nations do not have such personality or jurisdictional immunity since they are not designed to command action but only to act in the interest of certain persons. However, defendant, being an institution of international law *sui generis*, has the power to create the rules which are to govern its relations with its employees. These rules are enforceable, especially where, as here, they have been accepted by the employee. (A note by Ricardo Monaco is appended to this report.)

NOTES

Submerged Lands Act of 1953—retroactive effect

In *Superior Oil Co. v. Fontenot*, 213 Fed. (2d) 565 (5th Cir., June 18, 1954, rehearing denied, July 22, 1954), it was held that the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.*, either confirmed pre-existing State title to submerged lands or conferred a title relating back so as to confirm and maintain possession and title of the State as good from the beginning.

French spoliation claims—statute of limitations

A suit against the United States under the Declaratory Judgment Act of 1948 on a French spoliation claim favorably reported by the Court of Claims in advisory proceedings under the French Spoliation Act of 1885, but not paid by Congress, was held barred by the jurisdictional six-year statute of limitations applicable to actions against the United States. *Insurance Co. of North America v. U. S.*, 121 F. Supp. 649 (Ct. Cls., June 8, 1954; cert. denied, Oct. 25, 1954, N. Y. Times, Oct. 26, 1954).

War—definition

Holding, in *U. S. v. Bortlik*, 122 F. Supp. 225 (Middle D. Pa., July 28, 1954), a Jehovah's Witness entitled to Selective Service classification as a conscientious objector despite the fact that he was not opposed to participation in "theocratic warfare," the court said: "War as the term is commonly used, is a conflict by force between two or more nations; it is a conflict of violence by one politically organized body seeking to overcome or overthrow another political entity. It is patent that Congress was legislating in regard to this type of struggle, and was not concerned with wars carried on by the command and direction of God, i.e., theocratic wars."

War—determination of existence—insurance

Under Massachusetts law, the United States was held to be a "country at war" during hostilities in Korea, and a death in action in Korea in 1952 was held to have been the result of "an act of war" within the meaning of double indemnity clauses in life insurance policies. *Gagliormella v. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D. Mass., June 25, 1954).

War—enemy property controls

For cases dealing with enemy property controls, see *Brownell v. Bank of America Nat. Trust & Savings Assn.*, 214 Fed. (2d) 855 (Dist. Col., June 10, 1954); *Hawley v. Brownell*, 215 Fed. (2d) 36 (Dist. Col., Apr. 29, 1954); and *Tanaka v. Brownell*, 123 F. Supp. 31 (D. Idaho, S.D., July 21, 1954).

Carriage of goods by sea—interpretation of "Hague Rules"

In *Pyrene Co. v. Scindia Navigation Co.*, [1954] 2 All Eng. L. R. 158 (England, Q. B., April 14, 1954), the court interpreted several provisions of the 1924 Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea ("Hague Rules").

BOOK REVIEWS AND NOTES

Traité de Droit International Public (Avec Mention de la Pratique Internationale et Suisse). By Paul Guggenheim. Vol. I: pp. xxviii, 592, Index; Vol. II: pp. xvi, 592, Index. Geneva: Librairie de l'Université, 1953, 1954.

In the eighteenth century Blackstone might venture to deal with the entire body of the common law; obviously no one would attempt such a task today. International law, too, has expanded to such a remarkable degree that many feel that the day of the single treatise devoted to this subject is over. But such works continue to appear. As recent examples we may cite Sibert's revision of Fauchille-Bonfils and Rousseau's single-volume text, both of which are indispensable reference works. And now we have a brilliant two-volume treatise by the distinguished Swiss jurist and member of the faculty of the Graduate Institute of International Studies at Geneva. This work, admirably constructed and meticulously documented, is characterized throughout by rare erudition. In his careful and often original analyses, the author combines the best qualities of theorist and positivist. The result is a major work of great value to the specialist.

The work is distinguished by several remarkable features bound to be greatly appreciated. The most outstanding innovation is the inclusion in each subdivision of a section devoted to the law as it has been interpreted in Switzerland. Thus the author has accomplished for his country what the late Charles Cheney Hyde succeeded in doing in his monumental classic for international law as interpreted by the United States.

Professor Guggenheim is one of the few authors to take full advantage of both the Harvard Research volumes and the *Recueil* of the Academy of International Law at The Hague. In addition, the decisions of the Permanent Court of International Justice, the International Court of Justice, and international arbitral tribunals are widely cited, as well as many leading American cases. Especially striking is his extensive use of German authorities, both from Germany and from German Switzerland. In fact German sources are occasionally cited almost exclusively. Thus, where the author treats of the legal status of the Commonwealth, five-sixths of the cited authorities are German. French and American doctrinal literature is not always adequately represented. For example, in the section on responsibility of states, the main sources listed by the author fail to include the names of the leading American authorities, namely, Edwin M. Borchard, F. S. Dunn, and Alwyn V. Freeman. And in the section on the law of the air there is no mention of the pre-eminent authority, John C. Cooper.

Some of the author's views are quite controversial. He has followed Kelsen's basic theories of the nature of international law, the explanation

of its binding force, and the theory of the fundamental norm. Some may question his inclusion under the general title "international federations" of such disparate arrangements as the Concert of Europe, Commissions of Inquiry, the United Nations, and the Atlantic Pact. Nor will all commentators on the United Nations Charter accept his view that under Article 2, paragraph 7 (domestic questions), the organization has no right even to recommend a certain line of action to a given Member with respect to a matter within the purview of its *domaine réservé*. Nor does the contention that the relations between the members of the Commonwealth are today regulated exclusively by international law, enjoy the support of all leading authorities, for instance, Keith. Another disputed concept, brilliantly defended by Professor Guggenheim, is his view that the right of war, even before Nuremberg, was limited by customary international law—in other words, that the "doctrine of indifference," or of an unlimited right to make war, as upheld by Lauterpacht-Oppenheim, was unfounded.

In this treatise, the product of a lifetime of research and reflection, Professor Guggenheim has made an invaluable contribution to the literature of the law of nations.

JOHN B. WHITTON

Théories et Réalités en Droit International Public. By Charles de Visscher. Paris: Editions A. Pedone, 1953. pp. 468. Index.

The great Belgian scholar of international law, Charles de Visscher, a judge in both the World Courts, defends in the important work under review what he considers the correct approach toward international law in the present dangerous juncture of history. The two world wars have revealed the insufficiency of the international law actually in force and have, therefore, brought about a revolution in the science of international law, an effort to "re-think" it.

The author's first attack is directed against the method of pure, formal logic, overestimating the autonomy of the discipline of law, working with methods particularly inadequate to international law, which is still an extremely imperfect law and which, indeed, is "for the greatest part at the very frontiers of law" (p. 91). Any attempt to set up a logically perfect system of international law is premature at this time; the times are not ripe for brilliant logical generalizations. This attack is centered, as to doctrine, against Kelsen. In this form, this reviewer feels, the attack is unjustified. The author himself recognizes the outstanding merits and intuitions of Kelsen; he also overlooks the fact that Kelsen, in his latest writings, gives to politics an important place with regard to the administration and interpretation of the law. He overlooks that for Kelsen, as for the author, the making of the law is wholly a political action. He finally overlooks the fact that Kelsen by no means excludes political reality or axiological considerations from the law; he himself has written sociological investigations and is a lifelong searcher in the realm of the idea of justice. Kelsen has restricted himself only to the analytical ap-

proach, a quite legitimate undertaking. We feel that the author unjustifiedly neglects the analytical approach which is indispensable both theoretically and practically. All the more so as the author, like Kelsen, recognizes that law is a normative discipline, that any norm is a precept which can never be identified with a fact. The attack is also directed against "wishful thinking," so frequent nowadays with international lawyers, and against "unrealistic" law-making.

Science and politics of international law, the author rightly proclaims, must make contact with the realities, the facts, the limits which the present individualistic distribution of power among nations sets to the efficiency of international law. For de Visscher sees in this individualistic distribution of power, on which international law is dependent, the fundamental reason for the present deficiencies of international law. Every effort to organize international relations can be reduced to an attempt at the redistribution of power. But such efforts promise success only where a spontaneous process of integration assures a solid foundation. Thus the author considers that League of Nations law 1920-1939 "was too much in advance of the facts" (p. 84). The League of Nations was also too abstract; the Geneva Protocol of 1924 is a good example of "where the pure logic of Descartes comes into conflict with the facts." Hence also the author's skepticism *vis-à-vis* present European attempts at "supranational" organizations, born in the midst of worldwide "tensions of hegemony" and lacking spiritual affinities, as well as independent economic and military resources (p. 435).

The author stands for a "sociology of international law." In this sense the book is dedicated to Max Huber. But he also strongly stands against a one-sided "sociologism." Any attempt to reconstruct international law, departing from sociology, can only lead to confusion. For law is a normative discipline. The student of "international relations" is occupied with the observation and explanation of these relations; his ends and methods are necessarily different from that of the international lawyer; the latter must know this material as indispensable for juridical elaboration, but he uses for such elaboration only certain materials; the law must aim at generality, simplicity, security; a certain formalism is, therefore, inseparable from the normative ends of law.

There is a second argument against pure "sociologism": the law cannot be divorced from its moral inspirations; obligation is, in the last analysis, a moral problem; law, although different from ethics, flows from ethics.

The science of international law cannot reconstruct it sociologically only, but it can look at the rules and practice of international law through a well-informed critique of realities; it can point out the political, economic, demographic elements which determine their formation and condition their effectivity. Such inquiry can reveal the dangerous abyss which the greater and greater politicization of international relations tends to establish between the principles and the practice of states. Only a devitalized international law can be produced by a science which cuts it from the one or the two of its vital sources: a moral inspiration which is capable of

elevating the international norms progressively above their positive, contingent expressions; and an exact observation which maintains them firmly in contact with life.

Sociological studies, but no "sociologism"; "realistic," but absolutely opposed to the current "neo-realism"—that is the author's approach. And it is in this spirit that the book was written. The first part (pp. 13-91) reviews the development of political power in foreign affairs from the origin of the modern state to the present day, in practice and doctrine. The second part (pp. 93-161) deals with the general relations of power and law in international relations. The author comes to the conclusion that there is not yet a real "international community." He points to the things that are lacking: the lack of common values, the lack of any effective procedures of peaceful change (international law is "all too static"), the lack of real collective security. He deplores "the de-personalization of man through technology," the "*crise des élites*," the unforeseeable actions of "an ignorant and emotional public opinion," the factor of amoral-ity, constituted by a cold calculation of chances and the anonymous nature of sacrifices. He points to the entry of foreign, non-European, ideologies, to the Soviet concept of international law. He gives an extremely realistic criticism of the United Nations, "which, perhaps, is menaced with a new failure." He declares that the United Nations is at this time merely a symbol, not a realization of mankind's hope for peace; that NATO, although necessary, shows the return to the practice of alliances and is the mirror of a profoundly divided world.

The third part (pp. 163-389) reviews the principal norms of international law in the light of the author's approach; the fourth part (pp. 391-436) deals with the judicial settlement of international conflicts. This reviewer agrees with the author in most points, although there are some attitudes (the author's insistence that the coming into existence of states is "pre-judicial," that any attempt at laws of war is "*une entreprise sans issue*" (pp. 68, 353)) which need to be challenged.

JOSEF L. KUNZ

International Law Redefined. By Subimal Kumar Mukherjee. Calcutta: Uttarayan Ltd., 1954. pp. x, 166. 60 Rupees.

This small book by the lecturer in international law at the University of Calcutta consists of a series of essays dealing with problems of the laws of war, reprisals, and neutrality, and with problems of the United Nations. The book takes its title from the first and longest essay. Everywhere we note the fervent wish of the author to see a strong international law established, to see the realization of Willkie's "One World," dedicated under international law to the peace and prosperity of mankind. First of all, it seems to him necessary to re-define international law. With all the power at his command he wants to protest against international law as mere "power politics in disguise." He recognizes that the world order is on the point of collapse on account of power politics, built on the atomic and hydrogen bombs. The United Nations may be dying; but all that

should not create an atmosphere of pessimism: Reason and justice must triumph over force.

The redefinition of international law is necessary; it cannot be divorced from the needs of international society nor from the principles of justice and fairness. It must have a social, normative, and functional basis; it must be a just law, not a law of the victors. The "Leviathan" must be chained, sovereignty restricted, force put under law; individuals must fast become subjects of international law which, under the redefinition, is a "law for equitable and just regulation of inter-unit relations within the world community."

While the author shows a full knowledge of Anglo-American literature on international law and relevant documents, and while his burning enthusiasm and his good faith are unquestionable, two reservations must be made, one as to scientific correctness, the other as to political judgment.

In the first respect, the author sometimes confuses wishes *de lege ferenda* with the *lex lata*. Although he condemns in one place "utopian schemes," he praises in another place "utopia of today as the reality of tomorrow." Certain interpretations of United Nations Charter norms are hardly tenable from a legal point of view. The oratorical phrase "we, the peoples of the United Nations" is here taken as a legal statement, making the San Francisco Conference "a conference of the peoples."

As far as political judgment goes, the author is clearly right when he states that the division of the world into two hostile blocs cannot make for peace. But he seems gravely mistaken, and hardly neutral and objective, when he puts the blame for that exclusively on the shoulders of the West and, particularly, of the United States. While the Soviet Union and Communist China are nowhere defended, no reproach is anywhere voiced against them. But a whole essay (pp. 138-152) is dedicated to a very strong attack against NATO, in which he sees a "tragedy," "the last nail to the coffin of the dying U.N.," "a fatal stab in the back of the U.N.," and, in view of the invocation of Article 51, "Power Politics in Guise of Law." He states that "the assumption that Russia alone is guilty of bad dealing has yet to be proved by an impartial machinery." He has also adverse remarks against the "Pakistan-U. S. alliance," against American non-recognition of the Communist government of China, and finds the key to the solution in the "emphasis on peaceful co-existence of the East and the West in a world wide enough to accommodate differing ideologies."

JOSEF L. KUNZ

Droit International et Souveraineté en U. R. S. S. L'évolution de l'idéologie juridique soviétique depuis la Révolution d'Octobre. By Jean-Yves Calvez. Paris: Librairie Armand Colin, 1953. pp. 300.

This comprehensive analysis of Soviet ideology as it is related to international law clarifies an important challenge which it makes to the non-Communist. Communism cannot win a state which does not abandon the norms, principles, and standards which our civilization has developed.

Marxians do not accept as bases of law the doctrines of general jurisprudence, custom refined by ethics, or any other frame of reference originating in the sense of justice. To them such law is vitiated by its "class" origin. "Law does not exist by itself," said Lenin, and it is "nothing without policy," added Vyshinskii (p. 165). International law is an instrument for realizing in international relations "the principles of democratic socialism." Such dialectical assertions are fair notice that the Soviet ideologists aspire to make the rules serve their revolutionary and subversive aims.

M. Calvez examines the whole range of Communist casuistry on the subject. His intimate use of the Russian literature, listed in 16 pages of bibliography, produces a precise and perspicacious record of the gropings of the pundits for an international law the Soviets can claim as their own. "The Soviet ideology of the state, of law and of sovereignty has been developed to a point which seems to be self-contradictory," he concludes (p. 279). Lack of an ethical framework is suggested as a cause of this sterility. He points out that Marx and his successors, as a mark of deference to the ethical element in the human race, made their state the keeper of the "proletarian conscience," which they have neither defined nor discovered.

In a 30-page introduction M. Calvez neatly sets forth the Marxian dilemma in creating a multi-national Soviet Union as a state which, in the ideology, was bound to wither away and be reborn as a supranational proletarian community. Four chapters in his first part are devoted to the "Assaults Sustained by the Notion of State Sovereignty," understood as the right to liberty. Eugene A. Korovin conceived an international law "in the period of transition," the second edition of which (1924) is summarized. Eugene B. Pashukanis appeared next with an attempt to put into Communist doctrine the norms of international law adjusted to the concept of the struggle between the Communist and "capitalist" systems of polity. Both theses faded under criticism, with apologies by the authors, in 1936-1937.

The current concept is examined in a second part of the book entitled "The New Soviet Law: The Concept of Sovereignty, Basis of International Law," which has been growing up since 1937. "There is not," writes M. Calvez in summarizing it, "a single and universal international law to which the U.S.S.R. can hold by accepting unreservedly the same obligations and the same juridical situations as the capitalistic states: it is possible for it voluntarily to accept the same obligations but it always watches out for the possibility of finding itself in a different juridical situation." The chief exponents of this position are Serge B. Krylov, Korovin in a fresh mood, Vsevolod N. Durdenevskii, Feodor I. Kozhevnikov, Iosif D. Levin and Andrei I. Vyshinskii. Their work appears in a series of instruction manuals published since 1947 under the auspices of the Academy Nauk. Krylov and Durdenevskii did a manual in 1946 and edited *Mezhdunarodnoe Pravo* for that Institute of Law in 1947,¹ though Korovin

¹ Review by Korovin reprinted in this JOURNAL, Vol. 43 (1949), p. 387.

was called in to revise its general theory in 1951. Kozhevnikov's work apparently was approved, for he is the Soviet member of the International Court of Justice. But Vyshinskii as a combined statesman and jurist is the spearhead of the Soviet attack on international law, utilizing its tenets to forward Soviet intentions in the forum of the United Nations. His speeches on international politics and international law have been regularly collected and published.

From M. Calvez's detailed analysis of the Soviet writers it appears that international law does not stand in the way of Communists doing as they please. They are doughty protagonists of any rule that helps and stubborn antagonists of whatever rule hinders them.

DENYS P. MYERS

Historia del Derecho de Gentes. By Alejandro Herrero y Rubio. Valladolid: 1954. pp. 406.

The book under review was written by the Professor of International Law at the University of Valladolid as a textbook. After a brief survey of regional international laws in antiquity and in India (but not in China), he gives a full picture of the *communitas Christiana* of medieval Europe and of the formation of the present pluralistic international community by the decentralization of that medieval community.

The development since the sixteenth century is, as in most works of this type up to now, treated as a combination of a survey of historical developments conditioning the growth of international law and of the history of the science of international law. The outstanding feature of this work is the broad place and the detailed investigation given to the Spanish School. The representatives of the "classical" Spanish School (Vitoria, in whom he correctly sees "the father of international law," Domingo de Soto, Vázquez de Menchaca, Suárez, Luis de Molina, Baltasar de Ayala) are discussed in great detail. Particularly interesting is the long study (pp. 110-212) of the Spanish science of international law during the eighteenth century, largely unknown abroad, including José de Olmeda y León, author of the first treatise on international law in Spanish, and the critical evaluation of their shortcomings and their merits. Here the author moves in the field of his own original research, as testified by his earlier publications and his recent lectures at the Hague Academy of International Law.

JOSEF L. KUNZ

The Law of the Air. By Sir Arnold Duncan McNair. Second edition by Michael R. E. Kerr and Robert A. MacCrindle. London: Stevens & Sons Ltd., 1953. pp. xxiv, 500. Index. \$10.10.

The first edition of this book, published in 1932, was a notable product of British legal scholarship, marked by lucidity of thought and expression, acuteness of analysis, and a minimum of speculation. The new edition, which is twice as long, adheres to the original concept of the work. Atten-

tion remains centered on English private law. The reader is impressed, however, by the impact of international conventions on the development of English air law even in its strictly domestic aspects. For example, the Carriage by Air (Non-International Carriage) Order, 1952, has made the provisions of the Warsaw Convention applicable, with some modifications, to air transportation not covered by the convention, including that which takes place entirely within the United Kingdom. The tendency to assimilate domestic air law to international conventions, which is noticeable in other countries as well (see, *e.g.*, the Argentine Aeronautical Code of 1954), may yet produce substantial uniformity in some branches of private air law, domestic and "international," throughout the world.

The editors of the second edition have on the whole done an excellent job in bringing the book up to date. Such inaccuracies and infelicities of expression as occur are largely confined to matters peripheral to the main theme. For example, one is perplexed by the unexplained and unqualified assertion, in the section on nationality of aircraft, that a state is "responsible to other States for the conduct" of ships and aircraft which "belong" to it (p. 235). The context suggests that the editors are here referring to ships or aircraft which have the nationality of the state in question, rather than those which are owned or operated by the state itself. No authority is given for this sweeping attribution of absolute liability to a state. Also questionable is the view that "*cabotage* in air law is simply an affirmation of the principle of national sovereignty over air space" while "the *cabotage* known to maritime law rather constitutes an exception to the normal principle of the freedom of the seas" (p. 256). It would rather seem that in both cases *cabotage* is based on the state's sovereignty over its land territory, within which the passengers or cargo are taken on and discharged, and has no necessary connection with either sovereignty over airspace or with any restrictions upon the freedom of the seas. The editors display, furthermore, some lack of familiarity with American law (*e.g.*, in asserting that there is an obligation to register aircraft "in one of the states," p. 116). The framework of administrative law within which the British air carriers operate is surveyed very sketchily. The reader looks in vain for any mention of the subsidies granted to the Air Corporations or for an explanation of the legal basis of the recent phenomenal growth of the "independent" air transport services.

Despite minor shortcomings, the new edition continues to serve admirably the purpose of providing a clear and concise statement of the English private law of the air. It should be particularly useful to the student and the foreigner.

OLIVER J. LISSITZYN

The Anglo-Iranian Oil Dispute of 1951-1952: A Study of the Rôle of Law in the Relations of States. By Alan W. Ford. Berkeley and Los Angeles: University of California Press, 1954. pp. xii, 348. Index. \$4.00.

One of the *causes célèbres* of our times, the Anglo-Iranian oil dispute, has found a capable chronicler and interpreter. In a highly readable

account, Mr. Ford traces the development of the dispute and the various attempts to settle it. He stops with the decision in which the International Court of Justice upheld Iran's objection to its jurisdiction, and thus does not cover the later phases of the controversy and its actual settlement in 1954. The author's interests, however, are not those of an historian, but of a lawyer and political scientist, and the historical account is followed by an analysis of the rôle which international law played or could have played in the dispute. Both the International Court of Justice and the Security Council are taken to task for what the author regards as their failure to assert and strengthen the rule of law.

Mr. Ford believes that the Court erred in its choice between two possible interpretations of the Iranian acceptance of the "optional clause," and thus missed an opportunity to demonstrate its own ability to settle international disputes "fairly and effectively." Here the author—in addition to taking an unduly restrictive view of the admissibility of extrinsic evidence in the interpretation of international instruments (p. 171)—makes some very large assumptions. One of these seems to be that even if Iran failed to obey an adverse decision, the rule of law would have been somehow strengthened. But just how does an ineffective decision serve to strengthen the rule of law or to inspire confidence in the ability of the tribunal to settle disputes effectively? A related and even larger assumption, running throughout the book, is that "world public opinion," whatever that is, sets a high value on the compliance by states with international law.

Mr. Ford's grievance against the Court impels him to imply that it is largely useless if it does not try to impose its authority on unwilling states (p. 179). In the very next sentences, however, he in effect contradicts himself by making the rather dubious assertion that the paucity of decisions in contentious cases has prevented the International Court from contributing as much to the development of international law as the Permanent Court of International Justice did. It suffices to recall here that many of the contentious cases in which the Permanent Court made its greatest contributions were submitted to the Court by the voluntary agreement of the parties. Surely a standing court of arbitration, if that is what the International Court of Justice is fated to be, is not useless!

Mr. Ford's strictures on the failure of the Security Council to take decisive action in the dispute or at least to take a vote on a strong resolution even if it failed of adoption, and his proposal that the Council act as sheriff in compelling the restitution of improperly nationalized foreign properties, seem to stem from some misconceptions of the nature of the Security Council and of the society of states in which it operates. Despite an occasional caveat about political realities, the author comes all too close to mistaking the Council for a collective body capable of having a mind of its own and of dealing with disputes on their legal merits. In reality, the Council is a somewhat fortuitous assemblage of eleven states, each intent on protecting its own interest. And, again, it is not apparent how the taking of a vote, which was bound to reveal disagreement, could have

strengthened the rule of law or the prestige of the United Nations. In this connection, the author, in an otherwise informative and generally accurate survey of practice and opinion bearing on the problem of nationalization in international law, tends to exaggerate the degree of consensus in the non-Communist world with respect to the formula requiring "prompt, adequate and effective compensation." The division of opinion at the Hague Codification Conference of 1930 was much closer than the author indicates, and probably only the absence of many Latin American states prevented the "equality" doctrine from obtaining a majority. The author, furthermore, fails to mention the recurrent clashes on this issue at international gatherings such as the Bogotá Conference of 1948 or the adoption in 1952 by two-thirds of the U.N. General Assembly of a resolution widely interpreted as approving nationalization even without full compensation. Mr. Ford admits that in virtually none of the major settlements growing out of nationalization measures in recent decades—to which the Anglo-Iranian settlement can now be added—was the "pre-1914 norm" effectively applied, but fails to explore fully the legal implications of this fact or his own assumptions as to what constitutes a norm of international law. In what sense is the norm still valid if it neither describes accurately what has happened in the recent past nor predicts reliably what is likely to happen in the foreseeable future? The author, indeed, suggests that even the International Court of Justice might consider the norm antiquated (p. 229).

All in all, Mr. Ford's work is an important book for all international lawyers, and required reading for those grappling with the problems of protection of foreign investments. It is well edited and printed, although it is surprising to see Reza Khan's title persistently spelled as "Kahn."

OLIVER J. LISSITZYN

Military Tribunals and International Crimes. By John Alan Appleman. Indianapolis: Bobbs-Merrill Co., 1954. pp. xvi, 422. Index. \$8.00.

In this expertly written book, a distinguished member of the Illinois Bar, President of the Federal Insurance Council, looks at the entire complex of the war crimes trials as a practicing lawyer. Covering an enormous body of material, he deals with the Nürnberg and Tokyo international tribunals, the other 12 Nürnberg cases, and many proceedings held before military commissions and other tribunals of various nations. He discusses the substantive law, the procedure, and the personalities involved, and summarizes the indictments and judgments. He skillfully blends description with analysis, always paying much attention to defense arguments.

The first two thirds of the work are devoted to the Nürnberg International Military Tribunal, giving equal space to the fundamental questions of substantive law (violations of the laws and customs of war; crimes against humanity; aggressive war; conspiracy; the *ex post facto* and *respondeat superior* arguments, etc.) and to its procedure and rules of evidence (the position of the judges, the prosecution, the defense counsel, defendants, and witnesses; admissibility of documentary evidence, etc.).

The other trials are then reviewed in the light of the conclusions he has reached on the first Nürnberg case, but new problems which were posed by the other trials are discussed on their own merits. There is also a lucid short chapter on the pertinent rulings of the United States Supreme Court.

After a critical scrutiny conducted with the eye of an American practitioner, Appleman finds only few and relatively minor flaws; on the whole, he is satisfied both with the legality and fairness of the trials. At the same time, he makes certain recommendations for perfecting proceedings of this kind. In his compact presentation, the trials come to life; and the work is recommended for a succinct orientation on this important and complex subject.

The subject being so complex, any reviewer would find himself in disagreement with the author on some points. This reader would only venture two observations. At one point Appleman suddenly poses the "philosophical question" whether "talk about the rules of war, as correct as it may be legalistically," is not "an absurd anachronism" (p. 232). This suggestion is of course untenable, and contradicts his entire book. He appears to speak facetiously, carried away by indignation against war itself, as indicated by his preceding qualification, "If war is to be condoned at all . . ." and his immediate addition: "If humanity is to survive . . . the only solution to the problem is the absolute prevention of war." Secondly, in the Introduction the author says that in Nürnberg "certain organizations [e.g., the Nazi leadership corps, the SS guards, etc.] were indicted as criminal groups to establish the principle of collective guilt" (p. viii). That this was not so is shown by the author himself in his analysis of conspiracy and collective responsibility (Ch. VIII, pp. 40-45).

JOHN H. E. FRIED

Foreign Relations of the United States. Diplomatic Papers, 1936. Vol. I: *General; British Commonwealth*, pp. lxxvi, 892, \$4.25; Vol. II: *Europe*, pp. xcv, 853, \$4.25; Vol. III: *The Near East and Africa*, pp. lxi, 542, \$3.00; Vol. IV: *The Far East*, pp. xcii, 1012, \$4.50; Vol. V: *The American Republics*, pp. xcvi, 992, \$4.50. Washington: Government Printing Office, 1953 (Vols. I, III) and 1954 (Vols. II, IV, V). Index for each volume.

Events in Spain, Ethiopia, and the Far East, as well as the general situation in Europe, made the year 1936 one of considerable uneasiness but, so far as the United States was concerned, the year was not one of far-reaching commitment for world security. The Ambassador in Germany could report the "real joy" in that country "at the United States absolute neutrality" (Vol. I, p. 196). The American Ambassador to France could warn a representative of the French Foreign Ministry "not to base his foreign policy or any part of it on an expectation that the United States would ever again send troops or warships or floods of munitions and money to Europe" (Vol. II, p. 580).

International economic relations were far from encouraging. In April the Secretary of State told the British Ambassador that the whole structure of international finance and commerce was lying virtually prostrate, with no concern as to its restoration save by the espousal of the economic program which the United States Government had been strenuously supporting during the preceding two years (Vol. I, p. 651).

In the record of the year's diplomacy there is an occasional reference to generally recognized principles of international law (as in Vol. III, p. 2, and Vol. V, pp. 528, 760-761 and 829), but considerations other than legal ones also played a part. In a dispatch of February 7 the Ambassador to Japan reported that the United States was faced with "certain inescapable facts" with which it was "becoming increasingly impracticable to deal on a legal, moral or idealistic basis." He did not feel that the United States should "scrap its time-honored belief in the principle of the inviolability of treaties and in the moral and idealistic standards which it has traditionally championed," but suggested that the country in dealing with Japan could "no longer rely on those principles and standards" and must "supplement them in whatever effective way may command [*sic*] itself" (Vol. IV, p. 43). He concluded the same dispatch with the observation that "To shape our foreign policy on the unsound theory that other nations are guided and bound by our own present standards of international ethics would be to court sure disaster" (*ibid.*, p. 49).

With respect to other geographical areas there was occasion for alertness to Soviet moves as well as regard for the sensibilities of friendly nations. From the American Embassy in Moscow came a report of the Soviet leaders' view, in connection with the civil strife in Spain, that, if the Soviet Union was to continue to maintain hegemony over the international revolutionary movement, it must not hesitate in periods of crisis to assume the leadership of that movement (Vol. II, p. 461). In the Western Hemisphere the "Good Neighbor" policy was becoming firmly established; an Assistant Secretary of State, in a memorandum concerning the Central American Republics, expressed concern that the United States should create the impression, not that the American Government was assuming a "sterile policy of aloofness," but rather that it wished to carry out "a policy of constructive and effective friendship solely provided that neither this government nor its representative are drawn into any domestic concerns of any one of the Central American republics" (Vol. V, p. 131).

Among the numerous questions in the year's diplomacy having some special interest for the international lawyer were recognition of the Italian conquest of Ethiopia (Vol. III, pp. 162, 178, 242, 248), the effect of this conquest upon American Protestant missionary work in Ethiopia (*ibid.*, pp. 322-323, 327-330), methods of paying for foreign-owned property which had been expropriated (Vol. V, p. 705), modes of recognition of new governments (*ibid.*, pp. 863-867), asylum in diplomatic establishments (Vol. II, p. 737), taxation of Americans in the Far East in connection with land-holding under perpetual leases (Vol. IV, pp. 656, 662, 964), what constitutes intervention (Vol. V, pp. 817, 820, 850), and the use of

state authority beyond the traditional limits of territorial waters (Vol. I, p. 731, Vol. V, pp. 527, 530-531, 758-759, 764-770).

The reader gets a general impression of the great quantity of material covered in these volumes, even though in the case of at least one small country the record for the year consists of little more than a list of treaties, the texts of which may be found elsewhere (Vol. V, pp. 855-857). With the increasing number of volumes, the need becomes more apparent for a cumulative index; the last such index, published in 1941, covered the period 1900 to 1918.

ROBERT R. WILSON

Rechtsfragen der Europäischen Einigung. By Rudolf L. Bindschedler. Basel: Verlag für Recht und Gesellschaft, A. G., 1954. pp. xxviii, 424. Sw. Fr. 53.

Under the assumption that the organs of European unification will continue to grow, Professor Bindschedler compiled this volume on the legal implications of European integration. It is to Professor Bindschedler's credit, however, that he himself, in the book's concluding section, doubts the probability of the European Defense Community and the European (Political) Community ever becoming realities in their present terms. It may now be assumed that this doubt has been sustained, which unfortunately makes those sections of his book devoted to this problem of purely academic interest.

Professor Bindschedler's book is arranged in four parts, two of which (the introduction and conclusion) are devoted to the political atmosphere surrounding the cause of European unification following the second World War. Section Two is devoted to discussions in abstract of the legal principles being developed, while Section Three discusses the various European institutions (OEEC, EPU, Council of Europe, Coal and Steel Community, EDC and EPC) in detail, making a political science as well as an international law analysis. The political scientist will be most interested in the interrelationship of the various organs which is extensively developed in the volume.

From the point of view of international law, two problems emphasized by Professor Bindschedler deserve special mention. The first of these concerns the problem of parliamentary control. Dr. Bindschedler holds that the Council of Ministers of the CSC, EDC or EPC can make decisions within the framework of the treaty which are applicable in the various member states without further ratification. This is a major change as compared with other organs where members are delegates working under instructions, as the Councils unquestionably are.

The other problem concerns the question of conflicting treaties, *i.e.*, conflicts between the treaties establishing the organs of European unification (and the action of the organs) and the existing treaties between member states and third parties. While there are many such conflicts, the one most clearly singled out is the possible conflict between the EDC Treaty and the Franco-Soviet Alliance. Obviously, such questions deserve

further clarification in the light of world conditions and under the principle of *rebus sic stantibus*.

RICHARD STRAUS

Die Idee des Ewigen Friedens. By Hans-Jürgen Schlochauer. Bonn: Ludwig Röhrscheid, 1953. pp. 236.

The author, presently Dean of Frankfurt University School of Law, and recently appointed German member of the German-Israeli Court of Arbitration, defines the aim of his book in the subtitle: A Survey of the Idea and Growth of the Concept "Securing the Peace" (*Friedenssicherungsge-danke*), based upon a selection of source material. In other words, Schlochauer presents us with a reader in international law, and a very welcome one indeed.

About 56 pages of the book are dedicated to a description or a history of the concept of "peace." Not only is this historical essay very complete, but the author proves that he is a well-read man. He does not restrict his discourse to the strictly juridical literature in the field—aside from describing the efforts of statesmen and legislators—but deals with all the more important pieces of literature advocating organized international peace. The historical approach is maintained and Dr. Schlochauer leads us from hoary antiquity down to the present time.

Perhaps a very small omission should be pointed out immediately, for a reader not familiar with the subject of international law may get an incorrect impression. On page 50 Schlochauer states correctly that in the United Nations Security Council important decisions are to be made by an affirmative vote of the majority, the permanent members concurring. Since the United Nations Charter is not included in Schlochauer's book, probably because it is well known and almost the standard appendix of every modern textbook on international law, it seems fitting to point out that, according to Article 27 of the Charter, decisions in procedural matters do not require the unanimity of the permanent members; there can be no doubt that highly important subjects may fall under the term "procedural matters."

Teachers and students will find the following authors well represented in this anthology of international law and the peace movement: Aurelius Augustinus, Pierre Dubois, Georg v. Podiebrad, Erasmus, Sully, Crucé, William Penn, St. Pierre, Kant, Ladd, Victor Hugo, and Woodrow Wilson. There are furthermore included the Covenant of the League of Nations, the Briand-Kellogg Pact, the Atlantic Charter, and—of especial interest to the American reader, since the original texts are less known in this country—the Convention for European Economic Co-operation, and the Statute of the Council of Europe.¹ The texts are printed in the original language with a German translation on the opposite page. An excellent and complete bibliography closes the book.

ROBERT RIE

¹ Published in this JOURNAL, Supp., Vol. 43 (1949), pp. 94, 162.

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* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS

CONTENTS

UNITED NATIONS. Report of the International Law Commission Covering the Work of Its Sixth Session, June 3-July 28, 1954	1
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UNITED NATIONS
REPORT OF THE INTERNATIONAL LAW COMMISSION

COVERING THE WORK OF ITS SIXTH SESSION JUNE 3-JULY 28, 1954¹

CHAPTER I

INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its sixth session at Unesco House in Paris, France, from 3 June to 28 July 1954. The work of the Commission during the session is related in the present report which is submitted to the General Assembly.

I. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Gilberto Amado	Brazil
Mr. Roberto Córdova	Mexico
Mr. Douglas L. Edmonds	United States of America
Mr. J. P. A. François	Netherlands
Mr. F. V. García-Amador	Cuba
Mr. Shuhsi Hsu	China
Faris Bey el-Khoury	Syria
Mr. S. B. Krylov	Union of Soviet Socialist Republics
Mr. H. Lauterpacht	United Kingdom of Great Britain and Northern Ireland
<u>Mr. Radhabinod Pal</u>	<u>India</u>
Mr. Carlos Salamañca	Bolivia
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. Jaroslav Zourek	Czechoslovakia

3. The members listed above were elected by the General Assembly at its eighth session, with the exception of Mr. Edmonds who, on 28 June 1954, was elected by the Commission, in conformity with Article 11 of its Statute, to fill the vacancy caused by the resignation of Mr. John J. Parker. The term of office of the members is three years from 1 January 1954.

¹ U.N. General Assembly, 9th Sess., Official Records, Supp. No. 9 (A/2693).

4. All the members of the Commission were present at the sixth session except Mr. S. B. Krylov who for reasons of health was unable to attend. Mr. Spiropoulos attended the meetings from 6 June to 17 July, Mr. Scelle from the beginning of the session to 21 July. Mr. Zourek was present from 21 June and Mr. Edmonds from 5 July, both to the end of the session.

II. OFFICERS

5. At its meeting on 3 June 1954, the Commission elected the following officers:

Chairman: Mr. A. E. F. Sandström;
First Vice-Chairman: Mr. Roberto Córdova;
Second Vice-Chairman: Mr. Radhabinod Pal;
Rapporteur: Mr. J. P. A. François.

6. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, represented the Secretary-General and acted as Secretary of the Commission.

III. AGENDA

7. The Commission adopted an agenda for the sixth session consisting of the following items:

- (1) Filling of casual vacancy in the Commission;
- (2) Régime of the territorial sea;
- (3) Régime of the high seas;
- (4) Draft code of offences against the peace and security of mankind;
- (5) Nationality including statelessness;
- (6) Law of treaties;
- (7) Question of codifying the topic "Diplomatic intercourse and immunities";
- (8) Request of the General Assembly for the codification of the principles of international law governing State responsibility;
- (9) Control and limitation of documentation;
- (10) Date and place of the seventh session;
- (11) Other business.

8. In the course of the session the Commission held forty-one meetings. It considered the items on the agenda, with the exception of the régime of the high seas (item 3) and the law of treaties (item 6). The sixth report on the régime of the high seas (A/CN.4/79) submitted by Mr. François, special rapporteur, as well as the two reports on the law of treaties (A/CN.4/63 and A/CN.4/87) submitted by Mr. Lauterpacht, special rapporteur, were held over for consideration at the next session.

9. The work on the questions dealt with by the Commission is summarized in Chapters II to V of the present report.

CHAPTER II

NATIONALITY INCLUDING STATELESSNESS

PART ONE

Future Statelessness

10. At its fifth session in 1953, the International Law Commission proposed a draft Convention on the Elimination of Future Statelessness and a draft Convention on the Reduction of Future Statelessness which were transmitted to governments for comments.¹ The governments of the following fifteen countries replied with detailed comments: Australia, Belgium, Canada, Costa Rica, Denmark, Egypt, Honduras, India, Lebanon, The Netherlands, Norway, Philippines, Sweden, the United Kingdom and the United States of America (A/CN.4/82 and Add. 1 and 8). In addition a number of organizations interested in the question of statelessness submitted comments which were also taken into consideration by the Commission.

11. At its sixth session in 1954, during its 242nd to 245th, 250th, 251st, 271st, 273rd to 276th and 280th meetings, the Commission discussed the observations of governments and redrafted some of the articles in the light of their comments.

12. The most common observation made by governments was that some provisions of their legislation conflicted with certain articles of the draft conventions. Since statelessness is, however, attributable precisely to the presence of those provisions in municipal law, the Commission took the view that this was not a decisive objection for, if governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation.

13. For easy comparison, the text of both draft conventions, as now revised, is reproduced below in parallel columns. Passages which vary from the 1953 text are reproduced in italics. Most of the changes originate in suggestions made by governments and members of the Commission. In addition certain drafting changes were made. The final clauses in Articles 12 to 18 did not appear in the drafts of 1953.

14. Several governments in their comments declared themselves in favor of the reduction convention, while others expressed no preference for either convention or declared that they had no objections to the principles underlying each of the conventions. The Commission was of the opinion that it should, in view of these comments, submit both draft conventions to the General Assembly, which could consider the question whether preference should be given to the draft Convention on the Elimination of

¹ See Official Records of the General Assembly, Eighth Session, Supplement No. 9, document A/2456, pages 27 to 29. For the sake of brevity, the two conventions are here referred to as, respectively, the "elimination convention" and the "reduction convention."

Future Statelessness or to the draft Convention on the Reduction of Future Statelessness.

15. Article 1, paragraph 2, of the reduction convention, in its revised form, expressed more accurately than did the earlier text the Commission's intention that the person concerned should have the possibility to decide upon his nationality at an age when he will usually be called up for military service in the armed forces of the state of which he proposes to become a national.

16. Article 1, paragraph 3, of the reduction convention was, in several respects, revised. The 1953 draft read as follows:

3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the state of birth, he shall acquire the nationality of one of his parents. The nationality of the father shall prevail over that of the mother.

As the convention cannot make provision for cases where the parent has the nationality of a state not a party to the convention, a new clause was added expressly stipulating that the person concerned acquires his parent's nationality only "if such parent has the nationality of one of the parties." The phrase "such party (*i.e.*, that of which the parent is a national) may make the acquisition of its nationality dependent on the person having been normally resident in its territory" was inserted to take into account an observation of one of the governments. As the country of birth may, under paragraph 2, require residence as a condition of the acquisition of its nationality, it was considered proper that the parent's country should be free to stipulate an analogous condition.

17. Article 4 of both draft conventions deals with the case of a person not born in the territory of one of the parties. In this case, it is obvious that Article 1 of the elimination convention, and Article 1, paragraph 1, of the reduction convention will not be applicable. No substantive change was made in the 1953 text, but it is felt that the new text is both clearer and more accurate. The phrase "if otherwise stateless" was introduced in the light of an observation of one government because the article is, of course, meant to cover those cases, and only those cases, in which a person, because not born in the territory of a party, is stateless. If a person, even though born in a state not a party to the convention, acquires that state's nationality the article will not operate since he is not stateless.

18. Article 7 (old Article 6), paragraph 3, of the reduction convention was substantially modified in view of the attitude of a number of governments which are reluctant to waive the power to deprive a person of nationality if, by some positive act, such as departure or stay abroad, or by some omission such as failure to register, he implicitly displays a lack of attachment to his country. The Commission, keeping in mind that the main and only purpose of the draft convention is to reduce statelessness as much as possible, decided to restrict the possibility of depriving a person of nationality on such grounds to the case of a *naturalized* person if he resides in his country of origin for so long that under the law of his

adoptive country he may be considered to have severed his connection with that country.

19. Under Article 8 (old Article 7) of the elimination convention it is not permissible for a state to deprive a person of his nationality on any grounds whatsoever (whether by way of penalty or otherwise) if he would thereby become stateless.

20. In keeping with the difference in objective between the two draft conventions, the elimination convention allows no exceptions to the rule, but Article 8 (old Article 7), paragraph 1, of the reduction convention allows two exceptions: firstly, in the circumstances described in Article 7, paragraph 3; and, secondly, if in disregard of his government's direction the person enters or remains in the service of a foreign country. In these cases he may be deprived of his nationality even though he may as a consequence become stateless.

21. Article 8 (old Article 7), paragraph 2, of the reduction convention as now redrafted, no longer provides that the deprivation order may only be made by a judicial authority; in view of an observation by one government, it does not specify what authority is competent to make such an order but provides that an appeal to the courts must be possible.

22. The prohibition against deprivation of nationality on racial, ethnic, religious and political grounds contained in Article 8 of the 1953 draft is now reproduced in Article 9.

23. In Article 11, paragraph 1, of both draft conventions, which corresponds with Article 10, paragraph 1, of the 1953 draft, the words "when it deems appropriate" were added to stress that the proposed agency should have authority to decide in what cases its intervention is justified and also what cases may properly be referred to the special tribunal proposed to be established.

24. Article 11, paragraphs 2 to 4: The corresponding provision as drafted in 1953 (Article 10) contained a paragraph 4 under which disputes between states concerning the interpretation—or application—of the conventions were to be referred either to the International Court of Justice or to the special tribunal mentioned in paragraph 2 of the article. This alternative jurisdiction might conceivably have produced conflicts. Accordingly, the Commission decided to vest jurisdiction concerning such disputes in the special tribunal (Article 11, paragraph 2). The Commission considered it necessary, however, to make provision for the adjudication of such disputes by the International Court of Justice in case they should not be referred to the special tribunal (Article 11, paragraph 4).

25. The texts of both draft conventions, as adopted² by the Commission at its present session, are reproduced below:

² Mr. Edmonds abstained from voting on the draft conventions, as well as on the part of the report accompanying the drafts, for reasons explained at the Commission's 275th meeting (A/CN.4/SR.275). Mr. Zourek declared that he was voting against the draft conventions and the commentary relating to them for reasons of principle which he had given in the course of the discussions at the Commission's fifth session, and which he had summarized during the sixth session at the Commission's 275th meeting.

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS

PREAMBLE

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality,"

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality,"

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between states,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many states has increasingly tended to the progressive elimination of statelessness,

Whereas it is imperative, by international agreement, to eliminate the evils of statelessness,

The Contracting Parties

Hereby agree as follows:

ARTICLE 1

A *person* who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory *he* is born.

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS

PREAMBLE

Whereas the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality,"

Whereas the Economic and Social Council has recognized that the problem of stateless persons demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality,"

Whereas statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

Whereas statelessness is frequently productive of friction between states,

Whereas statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

Whereas the practice of many states has increasingly tended to the progressive elimination of statelessness,

Whereas it is desirable to reduce statelessness, by international agreement, so far as its total elimination is not possible,

The Contracting Parties

Hereby agree as follows:

ARTICLE 1

1. A *person* who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory *he* is born.

2. The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen years *and on the condition that on attaining that age he does not opt for and acquire another nationality.*

3. If, in consequence of the operation of paragraph 2, a person on attaining the age of eighteen years *would become stateless*, he shall acquire the nationality of one of his parents, *if such parent has the nationality of one of the Parties. Such Party may make the acquisition of its nationality dependent on the person having been normally resident in its territory.* The nationality of the father shall prevail over that of the mother.

ARTICLE 2

For the purpose of Article 1, a foundling, so long as *his* place of birth is unknown, shall be presumed to have been born in the territory of the Party in which *he* is found.

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For the purpose of Article 1, a foundling, so long as *his* place of birth is unknown, shall be presumed to have been born in the territory of the Party in which *he* is found.

ARTICLE 3

For the purpose of Article 1, birth on a vessel shall be deemed to have taken place within the territory of the state whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the state where the aircraft is registered.

ARTICLE 3

For the purpose of Article 1, birth on a vessel shall be deemed to have taken place within the territory of the state whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the state where the aircraft is registered.

ARTICLE 4

If a child is not born in the territory of a state which is a Party to this convention he shall, if otherwise stateless, acquire the nationality of the Party of which one of his parents is a national. The nationality of

ARTICLE 4

If a child is not born in the territory of a state which is a Party to this convention he shall, if otherwise stateless, acquire the nationality of the Party of which one of his parents is a national. Such Party

the father shall prevail over that of the mother. .

may make the acquisition of its nationality dependent on the person having been normally resident in its territory. The nationality of the father shall prevail over that of the mother.

ARTICLE 5

If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition, or adoption, such loss shall be conditional upon acquisition of another nationality.

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If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon acquisition of another nationality.

ARTICLE 6

(previous Article 5, paragraph 2)

The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

ARTICLE 6

(previous Article 5, paragraph 2)

The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

ARTICLE 7

(previous Article 6)

1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

2. *A person who seeks* naturalization in a foreign country or who *obtains* an expatriation permit for that purpose shall not lose *his* nationality unless *he acquires* the nationality of that foreign country.

3. *A person* shall not lose *his* nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground.

ARTICLE 7

(previous Article 6)

1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

2. *A person who seeks* naturalization in a foreign country or who *obtains* an expatriation permit for that purpose shall not lose *his* nationality unless *he acquires* the nationality of that foreign country.

3. *A natural-born national* shall not lose his nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register, or on any other similar ground. *A naturalized person may lose his nationality on account of residence*

in his country of origin for the period specified by the law of the Party which granted the naturalization.

ARTICLE 8

(previous Article 7)

A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless.

ARTICLE 8

(previous Article 7)

1. *A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless, except on the ground mentioned in Article 7, paragraph 3, or on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their state.*

2. *In the cases to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which shall provide for recourse to judicial authority.*

ARTICLE 9

(previous Article 8)

A Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

ARTICLE 9

(previous Article 8)

A Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

ARTICLE 10

(previous Article 9)

1. *Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.*

2. *In the absence of such provisions, a state to which territory is transferred or which otherwise acquires territory, or a new state formed on territory previously be-*

ARTICLE 10

(previous Article 9)

1. *Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.*

2. *In the absence of such provisions, a state to which territory is transferred, or which otherwise acquires territory, or a new state formed on territory previously be-*

longing to another state or states, shall confer *its* nationality upon the inhabitants of such territory unless *they* retain their former nationality by option or otherwise or have or acquire another nationality.

ARTICLE 11

(previous Article 10)

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act, *when it deems appropriate*, on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent *to decide any dispute between them concerning the interpretation or application of this convention* and to decide complaints presented by the agency referred to in paragraph 1 on behalf of *a person* claiming to have been denied nationality in violation of the provisions of the convention.

3. If, within two years *after* the entry into force of the convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been *established* by the Parties, any of the Parties shall have the right to request the General Assembly to *establish* such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the convention shall, *if not referred to the tribunal provided for in paragraph 2*, be submitted to the International Court of Justice.

ARTICLE 12

1. The present convention, having been approved by the General As-

longing to another state or states, shall confer *its* nationality upon the inhabitants of such territory unless *they* retain their former nationality by option or otherwise or have or acquire another nationality.

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3. If, within two years *after* the entry into force of the convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been *established* by the Parties, any of the Parties shall have the right to request the General Assembly to *establish* such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application of the convention shall, *if not referred to the tribunal provided for in paragraph 2*, be submitted to the International Court of Justice.

ARTICLE 12

1. The present convention, having been approved by the General As-

sembly, shall until . . . (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member state to which an invitation to sign is addressed by the General Assembly.

2. The present convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. After . . . (the above date) the present convention may be acceded to on behalf of any Member of the United Nations and of any non-member state which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 13

1. At the time of signature, ratification or accession any state may make a reservation permitting it to postpone, for a period not exceeding two years, the application of the convention pending the enactment of necessary legislation.

2. No other reservations to the present convention shall be admissible.

ARTICLE 14

1. The present convention shall enter into force on the ninetieth day following the date of the deposit of the . . . (*e.g.*, third or sixth) instrument of ratification or accession.

2. For each state ratifying or acceding to the present convention subsequently to the latter date, the convention shall enter into force on the ninetieth day following the de-

sembly, shall until . . . (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member state to which an invitation to sign is addressed by the General Assembly.

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2. For each state ratifying or acceding to the present convention subsequently to the latter date, the convention shall enter into force on the ninetieth day following the de-

posit of the instrument of ratification or accession by that state.

ARTICLE 15

Any Party to the present convention may denounce it at any time by a written notification addressed to the Secretary-General of the United Nations. Such denunciation shall take effect for the said Party one year after the date of its receipt by the Secretary-General.

ARTICLE 16

1. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member states referred to in Article 12 of the following particulars:

(a) Signatures, ratifications and accessions under Article 12;

(b) Reservations under Article 13;

(c) The date upon which the present convention enters into force in pursuance of Article 14;

(d) Denunciations under Article 15.

ARTICLE 17

1. The present convention shall be deposited with the Secretariat of the United Nations.

2. A certified copy of the convention shall be transmitted to all Members of the United Nations and to the non-member states referred to in Article 12.

ARTICLE 18

The present convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

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(c) The date upon which the present convention enters into force in pursuance of Article 14;

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The present convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

PART TWO

Present Statelessness

26. At its fifth session, the Commission requested Mr. Roberto Córdova, the special rapporteur, to inquire further into the question of present statelessness and to prepare a report for its sixth session (A/2456, paragraph 123).

27. The relevant report, entitled "Third Report on the Elimination or Reduction of Statelessness" (A/CN.4/81), contains four draft international instruments: a Protocol for the Elimination of Present Statelessness attached to the draft Convention on the Elimination of Future Statelessness, a Protocol for the Reduction of Present Statelessness attached to the draft Convention on the Reduction of Future Statelessness, an Alternative Convention on the Elimination of Present Statelessness and an Alternative Convention on the Reduction of Present Statelessness.

28. The Commission discussed the report at its 246th to 250th, 275th, 276th and 280th meetings.

29. The Commission considered that it was not feasible to suggest measures for the total and immediate elimination of present statelessness. The special rapporteur accordingly withdrew the draft Protocol for the Elimination of Present Statelessness and the Alternative Convention for the Elimination of Present Statelessness. The Commission also considered that the solutions offered by the draft Protocol on the Reduction of Present Statelessness, under which the provisions of the draft Convention for the Reduction of Future Statelessness were to be applicable to present statelessness, would not be acceptable. Hence the special rapporteur also withdrew this draft Protocol. In the course of the discussion (A/CN.4/SR.246) Mr. Lauterpacht submitted certain proposals for the reduction of present statelessness. The texts actually before the Commission were therefore Mr. Lauterpacht's proposals and the Alternative Convention on the Reduction of Present Statelessness prepared by the special rapporteur. It decided to accept the special rapporteur's draft as the basis of its discussion.

30. The special rapporteur amended his draft in the course of the discussion, to some extent taking into account Mr. Lauterpacht's proposals.

31. In formulating its proposals relating to present statelessness, the Commission considered that present statelessness could only be reduced if stateless persons acquired a nationality which would normally be that of the country of residence. Since, however, the acquisition of nationality is in all countries governed by certain statutory conditions including residence qualifications, the Commission considered that for the purpose of improving the condition of statelessness it would be desirable that stateless persons should be given the special status of "protected person" in their country of residence prior to the acquisition of a nationality. Stateless persons possessing this status would have all civil rights accorded to nationals with the exception of political rights, and would also be entitled

to the diplomatic protection of the government of the country of residence; the protecting state might impose on them the same obligations as it imposed on nationals.

32. The Commission welcomed the resolution of the Economic and Social Council endorsing the principles underlying the work of the Commission for the elimination or reduction of statelessness (resolution 526 B (XVII)) and also the decision of the Council to convene a conference of plenipotentiaries to review and adopt a protocol relating to the status of stateless persons by which certain provisions of the Convention relating to the Status of Refugees of 28 July 1951 would become applicable to stateless persons (resolution 526 A (XVII)).

33. The Commission considered the question of the relation of its work on present statelessness to the subject of the forthcoming conference of plenipotentiaries. It was of the opinion that, while the object of that conference was the regulation of the status of stateless persons by international agreement, the Commission was itself primarily concerned with the reduction of present statelessness.

34. In considering the problem of present statelessness, the Commission was aware of the fact that stateless persons who are refugees as defined in the Statute of the Office of the United Nations High Commissioner for Refugees receive international protection by the United Nations through the High Commissioner. The suggestions contained in the present report are without prejudice to the question of granting international protection by an international agency, as distinguished from diplomatic protection by states, to stateless persons pending their acquisition of a nationality.

35. The special rapporteur also proposed that *de facto* stateless persons should be assimilated to *de jure* stateless persons as regards the right of the status of "protected person" and the right to naturalization, provided that they renounced the ineffective nationality they possessed. This proposal was rejected by the Commission.

36. In view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted, though worded in the form of articles, should merely be regarded as suggestions which Governments may wish to take into account when attempting a solution of this urgent problem.

37. The suggestions adopted³ by the Commission are reproduced below with some comments.

³ Mr. Edmonds abstained from voting on the suggestions and on the part of the report relating to them, for reasons explained at the Commission's 276th meeting (A/CN.4/SR.276). Mr. François declared that, in voting for the suggestions, he wished to enter a reservation in respect of Article V, to which he was opposed for the reasons he had stated during the 276th meeting. Mr. Sandström abstained from voting on the suggestions for reasons stated at the same meeting. Mr. Zourek voted against the suggestions and against the part of the report relating thereto for reasons of principle stated in the course of the discussions and in connection with the vote taken on the draft conventions for the elimination or reduction of future statelessness, as well as for the reasons explained at the 276th meeting.

ARTICLE I

1. A state in whose territory a stateless person is resident shall, on his application, grant him the legal status of "protected person."

2. If a stateless person constitutes a danger to public order or to national security, he may be excluded from the benefit of the provisions of paragraph 1.

Comment

The Commission considers that, for the purpose of reducing statelessness, stateless persons should have an opportunity to acquire an effective nationality; this is provided for in Article V. However, it considered that, subject only to the proviso contained in paragraph 2, a stateless person should, pending the acquisition of a nationality, be granted certain rights which for most practical purposes would give him the status of a national.

ARTICLE II

1. A person possessing the status of "protected person" under Article I, paragraph 1, shall be entitled to the rights enjoyed by the nationals of the protecting state with the exception of political rights. He shall also be entitled to the diplomatic protection of the protecting state.

2. The protecting state may impose on him the same obligations as upon its nationals.

Comment

The obligations referred to in paragraph 2 of this article include those of military service.

ARTICLE III

Whenever the status of "protected persons" has been granted to a stateless person, his minor children and, on her application, his wife, shall acquire the said status, provided that they are stateless and resident in the territory of the protecting state.

Comment

This suggestion follows the rule in force in many countries concerning the effect of naturalization on the wife and children of a naturalized person.

ARTICLE IV

A child who possesses the status of "protected person" shall, on attaining the age of majority, acquire *ipso facto* the nationality of the protecting state, provided that he is resident in the territory of that state.

ARTICLE V

States shall grant their nationality to any stateless person who fulfills the conditions which their legislation prescribes for the naturalization of aliens.

Comment

The purpose of Article V is that stateless persons who fulfill the statutory conditions governing naturalization, including application and a prescribed period of residence, should be granted nationality as of right. The Commission felt that stateless persons should in this respect receive more favorable treatment than ordinary aliens in the matter of naturalization seeing that the latter, before being naturalized, have nevertheless a nationality whereas stateless persons have none.

ARTICLE VI

A person to whom the status of "protected person" is granted by a state shall not lose the benefit of the said status unless:

- (a) He acquires the nationality of that or of another state;
- (b) Another state Party hereto grants him the status of "protected person" in conformity with Article 1;
- (c) He resides abroad for five years without the authorization of the protecting state.

ARTICLE VII

There shall apply to any convention concluded on this subject the provisions of the conventions on the elimination and reduction of future statelessness concerning the interpretation and application of their terms, including the provisions for the creation of an agency to act on behalf of persons claiming to have been wrongfully denied nationality.

PART THREE

Other Aspects of the Subject of Nationality

38. At its 252nd meeting, the Commission held a general discussion on the subject of multiple nationality on which the special rapporteur had submitted a report (A/CN.4/83) and the Secretariat a memorandum (A/CN.4/84). Different views were expressed on this problem and on the desirability of dealing with it. Several members expressed the opinion that the Commission should content itself with the work it had done so far in the field of nationality.

39. The Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality.

40. The special rapporteur expressed before the Commission his appreciation of the valuable assistance rendered by Dr. P. Weis, legal adviser to the Office of the United Nations High Commissioner for Refugees, to him and his predecessor, Mr. M. O. Hudson, in the work on the topic "Nationality including statelessness."

CHAPTER III

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

41. By resolution 177 (II) of 21 November 1947, the General Assembly decided:

To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly,

and directed the Commission to:

(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.

The Commission's report to the General Assembly at the latter's fifth session in 1950⁴ contained the formulation of the Nürnberg principles. By resolution 488 (V) of 12 December 1950, the General Assembly asked the governments of Member States to comment on the formulation, and requested the Commission:

In preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by governments.

42. The preparation of a draft code of offences against the peace and security of mankind was given preliminary consideration by the Commission at its first session, in 1949, when the Commission appointed Mr. J. Spiropoulos special rapporteur on the subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to governments inquiring what offences, apart from those recognized in the Charter and judgment of the Nürnberg Tribunal, should be included in the draft code.

43. The special rapporteur's report to the second session in 1950 (A/CN.4/25) was taken as the basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and 2) to its questionnaire. In the light of the debate, a drafting committee prepared a provisional text (A/CN.4/R.6) which was referred, without discussion, to the special rapporteur, who was requested to continue his research and to submit a new report to the Commission at its third session in 1951.

⁴ See Official Records of the General Assembly, Fifth Session, Supp. No. 12, doc A/1316 [this JOURNAL, Supp., Vol. 44 (1950), p. 105].

44. The special rapporteur's report to the third session (A/CN.4/44) contained a revised draft and also a digest of the relevant observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. The Commission also considered the observations received from governments (A/CN.4/45 and Corr. 1, and Add.1 and 2) on this formulation. After debating these comments at its 89th to 92nd, 106th to 111th, 129th and 133rd meetings, the Commission adopted a draft code of offences against the peace and security of mankind which was submitted to the General Assembly in the Commission's report on its third session.⁵

45. The question of the draft code was included in the provisional agenda of the sixth session of the General Assembly, but was, by a decision of the Assembly at its 342nd plenary meeting on 13 November 1951, postponed until the seventh session.

46. By a circular letter to the governments of the Member States, dated 17 December 1951, the Secretary-General drew their attention to the draft code and invited their comments thereon. Comments were received from fourteen governments and were reproduced in documents A/2162 and Add.1. The Secretary-General also included the question of the draft code in the provisional agenda of the seventh session of the General Assembly. The item was, however, by a decision taken by the General Assembly at its 382nd plenary meeting on 17 October 1952, omitted from the final agenda of the seventh session on the understanding that the matter would continue to be considered by the International Law Commission.

47. The Commission again took up the matter at its fifth session in 1953 and decided to request the special rapporteur to undertake a further study of the question and to prepare a new report for submission at the sixth session.

48. The special rapporteur's report to the sixth session, entitled "Third Report relating to a draft Code of Offences against the Peace and Security of Mankind" (A/CN.4/85), discussed the observations received from governments and, in the light of those observations, proposed certain changes in the text of the draft code previously adopted by the Commission. The comments submitted by the Government of Belgium (A/2162/Add.2) were received too late to be discussed in the special rapporteur's report but were taken into consideration by the Commission.

49. The Commission considered the draft code at its 266th to 271st, 276th and 280th meetings, and decided to make certain revisions in the previously adopted text. The revised provisions are set forth below with some brief comments. The full text of the draft code as revised by the Commission is reproduced at the end of this chapter. For commentaries on those provisions of the draft code which were not modified by the Commission, see paragraph 59 of the Commission's report on its third session (A/1858).

50. Apart from making certain drafting changes, the Commission decided to modify the previous text of the draft code in the following respects.

⁵ *Ibid.*, Sixth Session, Supp. No. 9, doc. A/1858 [this JOURNAL, Supp., Vol. 45 (1951), p. 103].

ARTICLE 1

Offences against the peace and security of mankind, as defined in this code, are crimes under international law, for which the responsible individuals shall be punished.

Comment

The Commission decided to replace the words "shall be punishable" in the previous text by the words "shall be punished" in order to emphasize the obligation to punish the perpetrators of international crimes. Since the question of establishing an international criminal court is under consideration by the General Assembly, the Commission did not specify whether persons accused of crimes under international law should be tried by national courts or by an international tribunal.

In conformity with a decision taken by the Commission at its third session (see the Commission's report on that session, A/1858, paragraph 58 (c)) the article deals only with the criminal responsibility of individuals.

ARTICLE 2, PARAGRAPH 4

The organization, or the encouragement of the organization, by the authorities of a state, of armed bands within its territory or any other territory for incursions into the territory of another state, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another state, as well as direct participation in or support of such incursions.

Comment

The text previously adopted by the Commission read as follows:

The incursion into the territory of a state from the territory of another state by armed bands acting for a political purpose.

The Commission adopted the new text as it was of the opinion that the scope of the article should be widened.

ARTICLE 2, PARAGRAPH 9

The intervention by the authorities of a state in the internal or external affairs of another state, by means of coercive measures of an economic or political character, in order to force its will and thereby obtain advantages of any kind.

Comment

This paragraph is entirely new. Not every kind of political or economic pressure is necessarily a crime according to this paragraph. It applies only to cases where the coercive measures constitute a real intervention in the internal or external affairs of another state.

ARTICLE 2, PARAGRAPH 11

(previously paragraph 10)

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a state or by private individuals acting at the instigation or with the toleration of such authorities.

Comment

The text previously adopted by the Commission read as follows:

Inhuman acts by the authorities of a state or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

This text corresponded in substance to Article 6, paragraph (c), of the Charter of the International Military Tribunal at Nürnberg. It was, however, wider in scope than the said paragraph in two respects: it prohibited also inhuman acts committed on cultural grounds and, furthermore, it characterized as crimes under international law, not only inhuman acts committed in connection with crimes against peace or war crimes, as defined in that Charter, but also such acts committed in connection with all other offences defined in Article 2 of the draft code.

The Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connection with other offences defined in the draft code. On the other hand, in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a state.

ARTICLE 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

Comment

The text previously adopted read as follows:

The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.

Since some governments had criticized the expression "moral choice," the Commission decided to replace it by the wording of the new text above.

51. In addition, the Commission decided to omit Article 5 of the previous text as it felt that, at the present stage, the draft code should simply define certain acts as international crimes and lay down certain general principles regarding criminal liability under international law. The Commission considered that the question of penalties could more conveniently be dealt with at a later stage, after it had been decided how the code was to become operative.

52. With reference to a suggestion made by one government, the Commission confirms that the terms of Article 2, paragraph 12 (old paragraph 11), should be construed as covering not only the acts referred to in the Hague Conventions of 1907 but also any act which violates the rules and customs of war prevailing at the time of its commission.

53. In their observations on the draft code, several governments expressed the fear that the application of Article 2, Paragraph 13 (old paragraph 12), might give rise to difficulties. The Commission, although not overlooking the possibility of such difficulties, decided not to modify the wording of the paragraph as it felt that a court applying the code would overcome such difficulties by means of a reasonable interpretation.

54. The full text of the draft code as adopted⁶ by the Commission at its present session is reproduced below:

ARTICLE 1

Offences against the peace and security of mankind, as defined in this code, are crimes under international law, for which the responsible individuals shall be punished.

ARTICLE 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a state of armed force against another state for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a state to resort to an act of aggression against another state.

(3) The preparation by the authorities of a state of the employment of armed force against another state for any purpose other than national

⁶ Mr. Edmonds abstained from voting for reasons stated by him at the 276th meeting (A/CN.4/SR.276). Mr. Lauterpacht abstained from voting and, in particular, recorded his dissent from paragraphs 5 and 9 of Article 2 and from Article 4, for reasons stated at the 271st meeting (A/CN.4/SR.271). Mr. Pal abstained from voting for the reasons stated in the course of the discussions (A/CN.4/SR.276). Mr. Sandström declared that, in voting the draft code, he wished to enter a reservation in respect of paragraph 9 of Article 2 for the reasons stated at the 280th meeting (A/CN.4/SR.280).

1 P14711

or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a state, of armed bands within its territory or any other territory for incursions into the territory of another state, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another state, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a state of activities calculated to foment civil strife in another state, or the toleration by the authorities of a state of organized activities calculated to foment civil strife in another state.

(6) The undertaking or encouragement by the authorities of a state of terrorist activities in another state, or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another state.

(7) Acts by the authorities of a state in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a state of territory belonging to another state, by means of acts contrary to international law.

(9) The intervention by the authorities of a state in the internal or external affairs of another state, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

(10) Acts by the authorities of a state or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a state or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

(13) Acts which constitute:

- (i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

ARTICLE 3

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this code.

ARTICLE 4

The fact that a person charged with an offence defined in this code acted pursuant to an order of his government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

CHAPTER IV

RÉGIME OF THE TERRITORIAL SEA

I. INTRODUCTION

55. At its third session in 1951 the International Law Commission decided to initiate work on the topic "régime of territorial waters" which it had selected for codification and to which it had given priority pursuant to a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949. Mr. J. P. A. François was appointed special rapporteur on this topic.

56. The Commission was greatly assisted by the work done at the Conference for the Codification of International Law held at The Hague in March and April, 1930, which had amongst other subjects considered the régime of the territorial sea. Owing to differences of opinion concerning the extent of the territorial sea, it had proved impossible to conclude a convention relating to this question; nevertheless, the reports and preparatory studies of that Conference were a valuable basis on which the Commission has largely relied.

57. At the fourth session of the Commission in 1952, the special rapporteur submitted a "Report on the Régime of the Territorial Sea" (A/CN.4/53) which contained a draft regulation consisting of twenty-three articles, with annotations.

58. The Commission took the special rapporteur's report as the basis of discussion and considered certain aspects of the régime of the territorial sea from its 164th to its 172nd meetings.

59. During its fourth session in 1952, the Commission considered the question of the juridical status of the territorial sea; the breadth of the territorial sea; the question of base lines; and bays. To guide the special

rapporteur, it expressed certain preliminary opinions on some of these questions.

60. So far as the question of the delimitation of the territorial sea of two adjacent states is concerned, the Commission decided to ask governments for particulars concerning their practice and for any observations which they might consider useful. The Commission also decided that the special rapporteur should be free to consult with experts with a view to elucidating certain technical questions.

61. The special rapporteur was asked to submit at the fifth session a further report containing a draft regulation and comments revised in the light of opinions expressed at the fourth session.

62. In compliance with this request, the special rapporteur on 19 February 1953, submitted a "Second Report on the Régime of the Territorial Sea" (A/CN.4/61).

63. The group of experts mentioned above met at The Hague from 14 to 16 April 1953, under the chairmanship of the special rapporteur. Its members were:

Professor L. E. G. Asplund (Geographic Survey Department, Stockholm);

Mr. S. Whittemore Boggs (Special Adviser on Geography, Department of State, Washington, D. C.);

Mr. P. R. V. Couillault (Ingénieur en Chef du Service Central Hydrographique, Paris);

Commander R. H. Kennedy, O.B.E., R.N. (Retd.) (Hydrographic Department, Admiralty, London), accompanied by Mr. R. C. Shawyer (Administrative Officer, Admiralty, London);

Vice-Admiral A. S. Pinke (Retd.) (Royal Netherlands Navy, The Hague).

The group of experts submitted a report on technical questions. In the light of their comments, the rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1) in which the report of the experts appears as an annex.

64. The Secretary-General's inquiry addressed to governments concerning their attitude to the delimitation of the territorial sea of two adjacent states elicited a number of replies which are reproduced in documents A/CN.4/71 and Add.1 and 2.

65. Owing to lack of time the Commission was unable to discuss the topics at its fifth session and referred it to the sixth session.

66. At its sixth session the special rapporteur submitted a further revised draft regulation (A/CN.4/77) in which he made certain changes in the light of the observations of the experts. He also took into account the comments received from governments concerning the delimitation of the territorial sea between adjacent states the coasts of which face each other.

67. At its sixth session, the Commission considered the report at its 252nd to 265th, 271st to 273rd, 277th to 281st meetings. It adopted a

number of draft articles, with comments, which are to be submitted to governments in conformity with the provisions of its Statute.

68. On the question of the breadth of the territorial sea, divergent opinions were expressed during the debates at the various sessions of the Commission. The following suggestions were made:

(1) That a uniform limit (three, four, six or twelve miles) should be adopted;

(2) That the breadth of the territorial sea should be fixed at three miles, subject to the right of the coastal state to exercise, up to a distance of twelve miles, the rights which the Commission has recognized as existing in the contiguous zones;

(3) That the breadth of the territorial sea should be three miles, subject to the right of the coastal state to extend this limit to twelve miles, provided that it observes the following conditions:

(i) Freedom of passage through the entire area must be safeguarded;

(ii) The coastal state may not claim exclusive fishing rights for its nationals beyond the distance of three nautical miles from the base line of the territorial sea. Beyond this three-mile limit the coastal state may prescribe regulations governing fisheries in the territorial sea, though the sole object of such regulations must be the protection of the resources of the sea;

(4) That it should be admitted that the breadth of the territorial sea may be fixed by each state at a distance between three to twelve miles;

(5) That a uniform limit should be adopted for all states whose coasts abut on the same sea or for all states in a particular region;

(6) That the limit should vary from state to state in keeping with the special circumstances and historic rights peculiar to each;

(7) That the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf;

(8) That it should be admitted that the breadth of the territorial sea depends on different factors which vary from case to case, and it should be agreed that each coastal state is entitled to fix the breadth of its own territorial sea in accordance with its needs;

(9) That the breadth of the territorial sea, in so far as not laid down in special conventions, would be fixed by a diplomatic conference convened for this purpose.

69. The Commission realized that each of these solutions would meet with the opposition of some states. However, agreement will be impossible unless states are prepared to make concessions.

70. That being so, the Commission would be greatly assisted in its task if the governments could state, in their comments on these draft articles, what is their attitude concerning the question of the breadth of the territorial sea and suggest how it could be solved. The Commission hopes that the replies of governments will enable it to formulate concrete proposals concerning this matter.

71. The Commission felt that, pending the receipt of the replies of the governments, certain other questions should be held over, including that of

bays and groups of islands, for these questions are connected with the question of the breadth of the territorial sea.

72. The text of the provisional articles concerning the régime of the territorial sea as adopted⁷ by the Commission is reproduced below.

II. PROVISIONAL ARTICLES CONCERNING THE RÉGIME OF THE TERRITORIAL SEA

CHAPTER I

GENERAL

ARTICLE 1

Juridical status of the territorial sea

1. The sovereignty of a state extends to a belt of sea adjacent to its coast and described as the territorial sea.

2. This sovereignty is exercised subject to the conditions prescribed in these regulations and other rules of international law.

Comment

Paragraph 1 emphasizes the fact that the rights of the coastal state over the territorial sea do not differ in nature from the rights of sovereignty which it exercises over other parts of its territory. There is an essential difference between the régime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies of the governments in connection with the Hague Conference of 1930 and the report of the Conference's Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. This is also the view underlying some multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat territorial waters in the same way as other parts of state territory.

The Commission preferred the term "territorial sea" to "territorial waters." It is of the opinion that the term "territorial waters" lends itself to confusion for the reason that it may be used to describe both internal waters only, and internal and territorial waters taken together. For the same reason, the Codification Conference also expressed a preference for the term "territorial sea." Although not universally accepted, this term is becoming more and more prevalent.

⁷ Mr. Edmonds abstained from voting upon the articles and the part of the report relating to them for the reasons stated at the 281st meeting (A/CN.4/SR.281). Mr. Lauterpacht, in voting for the articles and the chapter of the report relating to them, dissented from the comment to Article 5 (straight base lines) and from Article 17 (right of passage) for reasons given in the course of the discussions. Mr. Sandström declared that, in voting for the draft articles, he wished to enter a reservation in respect of the provisions of Article 5 for the reasons he had stated at the 281st meeting (A/CN.4/SR.281). Mr. Zourek stated that he voted against the articles and against the commentary accompanying them for the reasons explained in the course of the discussions at the sixth session of the Commission.

Clearly, the coastal state's sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law. The reason why this is expressly mentioned in paragraph 2 is that the Commission wished to convey beyond any possible doubt that, while recognizing the state's sovereignty over the territorial sea, it did not endorse the idea of an unlimited sovereignty which has at times been claimed to be a quality implied in sovereignty.

This draft sets forth the specific limitations imposed by international law on the exercise of sovereignty in the territorial sea. These provisions should not, however, be regarded as exhaustive. Events which occur in the territorial sea and which have a legal import are also governed by the general rules of international law which cannot be codified in this draft as applying to the territorial sea in particular. For this reason, the "other rules of international law" are mentioned in addition to the provisions of this draft.

It may happen that, by reason of some special, geographical or other, relationship between two states, rights in the territorial sea are granted to one of them in excess of the rights recognized in this draft. It is not the intention of the Commission to limit any more extensive rights of passage or other rights enjoyed by states by virtue of custom or treaty.

ARTICLE 2

Juridical status of the air space over the territorial sea and of its bed and subsoil

The sovereignty of a coastal state extends also to the air space over the territorial sea as well as to its bed and subsoil.

Comment

This article reproduces, subject to purely stylistic changes, the provisions of the 1930 regulation. It may be said to form part of positive law. Since the present draft regulations deals exclusively with the territorial sea, the Commission did not consider the conditions in which sovereignty over the air space, sea bed and subsoil in question is exercised.

CHAPTER II

LIMITS OF THE TERRITORIAL SEA

ARTICLE 3

Breadth of the territorial sea ✓

(Postponed)

ARTICLE 4

Normal base line

Subject to the provisions of Article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart avail-

able, officially recognized by the coastal state. If no detailed charts of the area have been drawn which show the low-water line, the shoreline (high-water line) shall be used.

Comment

The Commission considered that, according to the international law in force, the extent of the territorial sea is measured, as a general rule, from the low-water line along the coast, but that, in certain cases, it is permissible under international law to employ base lines independent of the low-water mark. This is the Commission's interpretation of the judgment of the International Court of Justice rendered on 10 December 1951 in the Fisheries Case between the United Kingdom and Norway.

The traditional expression "low-water mark" may have different meanings; there is no uniform standard by which states in practice determine this line. The Commission considers that it is permissible to adopt as the base line the low-water mark as indicated on the largest-scale official charts of the coastal state. The Commission considers that the omission of detailed provisions such as were prepared by the 1930 Conference is hardly likely to induce governments to shift the low-water lines on their charts unreasonably.

In the absence of detailed charts indicating the low-water line, the only practical solution would seem to be to employ the shoreline (high-water line) as the base line.

ARTICLE 5

Straight base lines

1. As an exception, where this is justified for historical reasons or where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

2. As a general rule, the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straight base lines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals.

3. The coastal state shall give due publicity to the straight base lines drawn by it.

Comment

The International Court of Justice considers that where the coast is deeply indented or cut into, or where it is bordered by an archipelago such as the *skjaergaard* in Norway, the base line becomes independent of the low-water mark and can only be determined by means of a geometric construction. The Court said:

In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions. . . .

The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.⁸

The Commission interprets the Court's judgment, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; accordingly, it took this judgment as the basis in drafting the article. Since, however, it is of the opinion that the rules recommended by the experts who met at The Hague in 1953 add certain desirable particulars to the general method advised by the Court, it has endorsed the experts' recommendations in a slightly modified form.

The Commission considers that these additions represent a progressive development of international law, and that they cannot be regarded as binding until approved by states.

ARTICLE 6

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the base line equal to the breadth of the territorial sea.

Comment

This is the method of determining the outer limit recommended by the group of experts; it had been in use already before 1930. By means of this

⁸ I.C.J. Reports, 1951, pp. 129 and 130.

method one obtains a line which in the case of deeply indented coasts departs from the line which follows the sinuosity of the coast. It is undeniable that the latter would often be so tortuous as to be unusable for the purpose of shipping.

The line all the points of which are at a distance of T miles from the nearest point on the coast (T being the breadth of the territorial sea) may be obtained by means of a continuous series of arcs of circles drawn with a radius of T miles from all points on the coast line. The outer limit of the territorial sea is formed by the most seaward arcs. In the case of a deeply indented coast, this line although undulating will form less of a zigzag than if it followed all the sinuosities of the coast because circles drawn from those points on the coast where the coast line is most irregular will not usually affect the outer limit of the seaward arcs. In the case of a straight coast, or if the straight base line method is followed, the arcs of circle method produces the same results as the strictly parallel line.

The Commission considers that the arcs of circle method is to be recommended because it is likely to facilitate navigation. In any case, the Commission feels that states should be free to use this method without running the risk of being charged with a violation of international law by reason of the fact that the line does not follow all the sinuosities of the coast.

ARTICLE 7

Bays

(Postponed)

ARTICLE 8

Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbor works which form an integral part of the harbor system shall be regarded as forming part of the coast.

Comment

This article is consistent with the positive law now in force.

The waters of a port up to a line drawn between the outermost installations form part of the inland waters of the coastal state. This draft regulation does not contain provisions relating to the régime of ports for it deals exclusively with the territorial sea. The important question of the régime of ports is to be considered at a later stage in the Commission's work.

Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) are assimilated to harbor works.

ARTICLE 9

Roadsteads

Roadsteads which are used for the loading, unloading and anchoring of vessels and which are situated wholly or partly outside the outer

limit of the territorial sea is fixed in the territorial sea. The coastal state must give due regard to the limits of such roadsteads.

Comment

Apart from stylistic changes, this article reproduces the 1930 text. The Commission considers that roadsteads situated outside the territorial sea should not be treated as inland waters. While appreciating that the coastal state must be able to exercise special supervisory and police rights in the roadsteads, the Commission thought it excessive to treat them as part of inland waters for the purpose of innocent passage of merchantmen through them might conceivably be prohibited.

The fact that these roadsteads are to be part of the territorial sea constitutes sufficient protection for the rights of the state.

The Commission considers that the article as it now stands reproduces the international law in this respect.

ARTICLE 10

Islands

Every island has its own territorial sea. An island is an area of land surrounded by water which in normal circumstances is permanently above high-water mark.

Comment

This article applies both to islands situated in the high seas and to islands in the territorial sea. In the case of the latter their own territorial sea coincides partly with the territorial sea of the coast. The presence of the island produces an outward bulge in the outer limit of the territorial sea. This phenomenon can be expressed in the following form: islands, wholly or partly situated in the territorial sea, will be taken into consideration for the purpose of determining the outer limit of the territorial sea.

It is an essential condition that an island, to qualify for that name, must be an area of land which, apart from abnormal circumstances is permanently above high-water mark. Accordingly, the following are not considered islands and have no territorial sea:

(i) Elevations which emerge at low tide only. Even if an installation is built on such an elevation and if that installation (*e.g.*, a lighthouse) is permanently above water level the term island as defined in this article cannot be applied to such an elevation;

(ii) Technical installations built on the sea bed, such as installations used for the exploitation of the continental shelf. As is evident from the Commission's report on the 1958 session (A/2456), it is nevertheless proposed that a safety zone around such installations should be recognized in view of their great vulnerability. The Commission does not think that a similar measure is appropriate in the case of lighthouses.

ARTICLE 11

Groups of islands

(Postponed)

ARTICLE 12

Drying rocks and shoals

Drying rocks and shoals which wholly or partly lie within the territorial sea may be taken as points of departure for determining the territorial sea.

Coastal waters

Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying rocks and shoals however which are situated outside the territorial sea have no territorial sea of their own.

The Commission considers that the above article expresses the international law in force.

It was said that the terms of Article 11 under which base lines are not drawn to or from drying rocks and shoals, might perhaps not be compatible with Article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are not treated as islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of base lines is concerned, and in particular in the case of shallow waters off the coast, the drawing of base lines and the coast might conceivably be far in excess of that intended to be laid down by the method of these base lines.

ARTICLE 13

Delimitation of the territorial sea in straits

1. In straits joining two parts of the high seas and separating two or more states, the limits of the territorial sea shall be determined in the same manner as on the other parts of the coast.
2. If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the states in question shall be determined in conformity with Article 15.
3. If the breadth of the straits exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if as a consequence of this delimitation an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal states, be deemed to be part of the territorial sea.

4. Paragraph 1 and the first sentence of paragraph 3 of this article shall be applicable to straits which join two parts of the high seas and which have only one coastal state in cases in which the breadth of the straits is greater than twice the breadth of that state's territorial sea. If as a consequence of this delimitation an area of sea not more than two miles across is entirely enclosed in the territorial sea, such area may be declared by the coastal state to form part of its territorial sea.

Comment

Within the straits with which this article deals the belts of sea along the coast constitute territorial sea in the same way as on any other part of the coast.

Where the width throughout the straits exceeds the sum of the breadth of the two belts of territorial sea, there is a channel of high sea through the strait. On the other hand, if the width throughout the strait is less than twice the breadth of the two belts of territorial sea, the waters of the strait will be territorial waters. Other cases may arise: at certain places the width of the strait is greater than, while elsewhere it is equal to or less than, the total breadth of the two belts of territorial sea. In these cases portions of the high sea may be surrounded by territorial sea. It was thought that there was no valid reason why these enclosed portions of sea—which may be quite large in area—should not be treated as the high sea. This view is confirmed by the consideration that in such circumstances the stretch of sea between the two coasts might be treated as two straits separated by open sea. If such areas are very small, however, practical reasons justify their assimilation to territorial sea; but it is proposed in the article to confine such exceptions to “enclaves” of sea not more than two nautical miles in width; this distance was chosen by the Commission in reliance on the precedent of the 1930 Conference, though it is not claimed that this is now an existing rule of positive law.

If both shores belong to the same state, the issue of a delimitation of territorial waters can only arise if the strait is more than twice as broad as the territorial sea. In this case the rule set forth in paragraph 1 will apply. The question of enclaves dealt with in paragraph 3 may crop up in this situation too, in which case the enclave (if not more than two miles in breadth) may be treated as territorial sea.

ARTICLE 14

Delimitation of the territorial sea at the mouth of a river

(Postponed)

ARTICLE 15

*Delimitation of the territorial sea of two states
the coasts of which are opposite each other*



The boundary of the territorial sea between two states the coasts of which are opposite each other at a distance less than twice the breadth

the best solution seems to be the median line which the committee of experts suggested. Such a line should be drawn according to the principle of equidistance from the respective coastlines (see the reply of the French Government, A/CN.4/71/Add. 2, pages 2 and 3). Where the coast is straight, a line drawn according to this method will coincide with one drawn at right angles to the coast at the intersection of the land frontier and the coastline. If, however, the coast is curved or irregular, the line takes the contour into account while avoiding the difficulties of the problem of the general direction of the coast.

The Commission had already expressed support for the opinion of the experts in the matter of the delimitation of the continental shelf between two adjacent states (see A/2456, draft Article 7, paragraph 2, relating to the continental shelf).

It followed the same method in the matter of the delimitation of the territorial sea. The observation made at the end of the comment on Article 15 also applies to this article.

CHAPTER III

RIGHTS OF PASSAGE

ARTICLE 17

Meaning of the right of passage

1. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.

2. Passage is not innocent if a vessel makes use of the territorial sea of a coastal state for the purpose of committing any act prejudicial to the security or public policy of that state or to such other of its interests as the territorial sea is intended to protect.

3. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

Comment

This article follows the lines of the regulation proposed by Sub-Committee II of the 1930 Conference, but the Commission considered that "fiscal interests"—a term which according to the 1930 comments should be interpreted very broadly as including all matters relating to customs and to export, import and transit prohibitions—could be included in the more general expression "such other of its interests as the territorial sea is intended to protect." This expression comprises, *inter alia*, questions relating to immigration, customs and health as well as the interests enumerated in Article 21.

This chapter applies only in time of peace; rights of passage in time of war are reserved.

No provision in this chapter is meant to affect the rights and obligations of Members of the United Nations under the Charter.

SECTION A: VESSELS OTHER THAN WARSHIPS

ARTICLE 18

Rights of innocent passage through the territorial sea

Subject to the provisions of these regulations, vessels of all states shall enjoy the right of innocent passage through the territorial sea.

Comment

This article lays down that the vessels of all states have the right of innocent passage through the territorial sea. It reiterates a principle recognized by international law and confirmed by the 1930 Conference.

The conditions governing the exercise of this right are set forth in the articles which follow. Some members of the Commission argued that, since the coastal state has sovereignty in the territorial sea, it would be more logical to specify the duties of coastal states with respect to innocent passage and not to make those duties appear as exceptions to a right of passage of other states. The Commission preferred to follow the method recommended by the 1930 Conference in order to stress the importance it attaches to the right of passage.

ARTICLE 19

Duties of the coastal state

1. The coastal state is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communication and not to allow the said sea to be used for acts contrary to the rights of other states.

2. The coastal state is bound to give due publicity to any dangers to navigation of which it has knowledge.

Comment

This article confirms the principles which were upheld by the International Court of Justice in its judgment of 9 April 1949 in the Corfu Channel case between the United Kingdom and Albania.

ARTICLE 20

Right of protection of the coastal state

1. The coastal state may take the necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that state or to such other of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland

waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

2. The coastal state may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that that is necessary for the maintenance of public order and security. In this case the coastal state is bound to give due publicity to the suspension.

Comment

In the same way as Article 5 drafted by Sub-Committee II of the 1930 Conference, this article gives the coastal state the right to verify, if necessary, the innocent character of the passage and to take the steps necessary to protect itself against any act prejudicial to its security, public order, customs interests, import, export and transit prohibitions, and so forth. In exceptional cases even a temporary suspension of the right of passage is permissible, if compelling reasons connected with public order or general security so require. Although it is arguable that this power was in any case implied in paragraph 1 of the article, the Commission considered it desirable to mention it expressly in paragraph 2 which specifies that only a temporary suspension in definite areas is permissible. The Commission is of the opinion that the article states the international law in force.

ARTICLE 21

Duties of foreign vessels during their passage

Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted by the coastal state in conformity with these regulations and other rules of international law and, in particular, as regards:

- (a) The safety of traffic and the protection of channels and buoys;
- (b) The protection of the waters of the coastal state against pollution of any kind caused by vessels;
- (c) The protection of the products of the territorial sea;
- (d) The rights of fishing, hunting and analogous rights belonging to the coastal state.

Comment

International law has long recognized the right of the coastal state to enact in the general interest of navigation special regulations applicable to vessels exercising the right of passage through the territorial sea. The principal powers which international law has hitherto recognized as belonging to the coastal state for this purpose are defined in this article.

The corresponding article drafted by Sub-Committee II of the 1930 Conference contained a second paragraph reading:

The coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.

By omitting this paragraph, the Commission did not mean to imply that it does not contain a general rule valid in international law. Nevertheless, the Commission considers that certain cases may occur in which special rights granted by one state to another specified state may be fully justified by the special relationship between those two states; in the absence of treaty provisions to the contrary, the grant of such rights cannot be invoked by other states as a ground for claiming similar treatment. The Commission prefers, therefore, that this question should continue to be governed by the general rules of law.

ARTICLE 22

Charges to be levied upon foreign vessels

1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel.

Comment

The object of this article is to exclude any charges in respect of general services to navigation (light or conservancy dues) and to allow payment to be demanded only for special services rendered to the vessel (pilotage, towage, etc.). The article states the international law now in force.

As a general rule these charges are applicable on a footing of equality. For reasons analogous to those given for the omission of a second paragraph from Article 21, the Commission did not reproduce the words "these charges shall be levied without discrimination" which occurred in the corresponding article drafted by the 1930 Conference.

ARTICLE 23

Arrest on board a foreign vessel

1. A coastal state may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

- (a) If the consequences of the crime extend beyond the vessel; or
- (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (c) If the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

2. The above provisions do not affect the right of the coastal state to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel lying in its territorial sea, or passing through the territorial sea after leaving the inland waters.

3. The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel.

Comment

This article enumerates the case in which the coastal state may stop a foreign vessel passing through its territorial sea for the purpose of arresting persons or conducting an investigation in connection with a criminal offence committed on board the vessel during that particular passage. In such a case a conflict of interest occurs: on the one hand, there are the interests of shipping which should suffer as little interference as possible; and on the other there are the interests of the coastal state which wishes to enforce its criminal law throughout its territory. Without prejudice to the coastal state's power to hand the offenders over to its tribunals (if it can arrest them), its power to arrest persons on board ships which are merely passing through the territorial sea may only be exercised in the cases expressly enumerated in the article.

The coastal state has no authority to stop a foreign vessel passing through the territorial sea, without entering inland waters, merely because some person happens to be on board who is wanted by the judicial authorities of that state in connection with some punishable act committed elsewhere than on board the ship. *A fortiori*, a request for extradition addressed to the coastal state by reason of an offence committed abroad cannot be considered as a valid reason for stopping the vessel.

In the case of a vessel lying in the territorial sea, the jurisdiction of the coastal state will be regulated by the state's own municipal law and will necessarily be more extensive than in the case of vessels which are simply passing through the territorial sea along the coast. The same observation applies to vessels which have been in one of the ports or navigable waterways of the coastal state; if, for instance, a vessel anchored in a port, or had contact with the land, or took on passengers, the powers of the coastal state would be greater. The coastal state, however, must always do its utmost to interfere as little as possible with navigation. The inconvenience caused to navigation by the stopping of a large liner outward bound in order to arrest a person alleged to have committed some minor offence on land can scarcely be regarded as of less importance than the interest which the state may have in securing the arrest of the offender. Similarly, the judicial authorities of the coastal state should, as far as possible, refrain from arresting any of the officers or crew of the vessel if their absence would make it impossible for the voyage to continue.

Accordingly, the proposed article does not attempt to solve conflicts of jurisdiction between the coastal state and the flag state in the matter of criminal law, nor does it in any way prejudice their respective rights. The Commission realizes that it would be desirable to codify the law relating to these matters. It appreciates that it is important to determine what tribunal is competent to deal with any criminal proceedings to which collisions in the territorial sea may give rise. The fact that, in keeping with the example of the 1930 Conference, the Commission nevertheless did

not formulate express rules concerning this matter, is to be explained by the consideration that in this very broad field the Commission's task must inevitably be limited. Again, the Commission did not deal with the matter of collisions because, since 1952, a convention relating to the subject has been in existence and this convention has not yet been ratified by a considerable number of states; the convention in question is entitled "International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation" and was signed at Brussels on 10 May 1952. The Commission proposes, however, to study this topic later.

ARTICLE 24

Arrest of vessels for the purpose of exercising civil jurisdiction

1. A coastal state may not arrest or divert a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal state may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal state.

2. The above provisions are without prejudice to the right of the coastal state in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the state or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the state, for the purpose of any civil proceedings.

Comment

In this article the Commission adopted a rule analogous to that governing the exercise of criminal jurisdiction. A vessel which is only navigating the territorial sea without touching the inland waters of the coastal state may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board or of levying execution against or arresting the vessel itself, except as a result of events occurring in the waters of the coastal state during the voyage in question, as for example, a collision, salvage, etc., or in respect of obligations incurred for the purpose of the voyage.

The article does not attempt to provide a general solution for conflicts of jurisdiction in private law between the coastal state and the flag state. Questions of this kind will have to be settled in accordance with the general principles of private international law and cannot be dealt with by the Commission at this stage of its work. Hence, questions of competence with regard to liability under civil law for collisions in the territorial sea are not covered by this article. Two conventions materially affecting questions of civil jurisdiction were drawn up at the Brussels Conference referred to in the comment to the previous article, namely, the International Convention on Certain Rules concerning Civil Jurisdiction in Mat-

ters of Collision and the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, both dated 10 May 1952. The sole purpose of the article adopted by the Commission is to prohibit the arrest of a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction, except in certain clearly defined cases.

ARTICLE 25

Government vessels operated for commercial purposes

The rules contained in the preceding articles of this chapter shall also apply to government vessels operated for commercial purposes.

Comment

The Commission followed the rules of the Brussels Convention of 1926 concerning the Immunity of State-Owned Vessels; it considers that these rules follow the preponderant practice of states, and has therefore formulated this article accordingly.

SECTION B: WARSHIPS

ARTICLE 26

Passage

1. Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification.

2. The coastal state has the right to regulate the conditions of such passage. It may prohibit such passage in the circumstances envisaged in Article 20.

3. Submarines shall navigate on the surface.

4. There must be no interference with the passage of warships through straits used for international navigation between two parts of the high seas.

Comment

To state that the coastal state will authorize the innocent passage of foreign warships through its territorial sea is but to recognize the existing practice. The above provision is also in conformity with the practice which, without laying down any strict and absolute rule, leaves to the state the power, in exceptional cases, to prohibit the passage of foreign warships through its territorial sea. Hence the coastal state has the right to regulate the conditions of passage. In this respect the terms of Article 20, relating to merchantmen, also apply to warships.

The right of passage does not imply that warships are entitled, without special authorization, to stop or anchor in the territorial sea. The Commission did not consider it necessary to insert an express stipulation to this effect for Article 17, paragraph 3, applies equally to warships.

The Commission took the view that passage should be granted to war-

ships without prior authorization or notification. Some members of the Commission held however that, under the international law in force, the passage of foreign warships through the territorial sea was a mere cession and hence subject to the consent of the coastal state.

The right of the coastal state to restrict passage is more limited in the case of passage through straits. The International Court of Justice in its judgment of 9 April 1949 in the Corfu Channel case says:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁹

In inserting paragraph 4, the Commission relied on that judgment.

ARTICLE 27

Non-observance of the regulations

1. Warships shall be bound, when passing through the territorial sea to respect the laws and regulations of the coastal state.

2. If any warship does not comply with the regulations of the coastal state and disregards any request for compliance which may be brought to its notice, the coastal state may require the warship to leave the territorial sea.

Comment

The terms of paragraph 1 do not mean that the extraterritoriality of warships is limited in any way during the passage through the territorial sea. The object of the provision is only to emphasize that while the warship is in the territorial sea of the coastal state the vessel must comply with the laws and regulations of that state concerning navigation, security, health questions, water pollution and the like.

CHAPTER V

OTHER DECISIONS

I. CODIFICATION OF THE TOPIC "DIPLOMATIC INTERCOURSE AND IMMUNITIES"

73. In pursuance of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of the topic "Diplomatic intercourse and immunities" and to treat it as a priority topic, the Commission decided to initiate work on this subject. It appointed Mr. A. E. F. Sandström as special rapporteur.

⁹ I.C.J. Reports, 1949, p. 28.

II. REQUEST OF THE GENERAL ASSEMBLY FOR THE CODIFICATION OF THE
PRINCIPLES OF INTERNATIONAL LAW GOVERNING
STATE RESPONSIBILITY

74. The Commission took note of General Assembly resolution 799 (VIII) of 7 December 1953 requesting it to undertake, as soon as it considered it advisable, the codification of the principles of international law governing state responsibility. A memorandum on the question (A/CN.4/80) was submitted by one of the members, Mr. F. V. García-Amador. In view of the Commission's heavy agenda, it was decided not to begin work on the subject for the time being.

III. CONTROL AND LIMITATION OF DOCUMENTATION

75. The Commission took note of General Assembly resolution 789 (VIII) of 9 December 1953 regarding the control and limitation of the documentation of the United Nations.

IV. SPANISH INTERPRETATION

76. On the proposal of Mr. Roberto Córdova, the Commission adopted the following resolution:

The International Law Commission,

Taking into consideration that the Spanish language, according to resolution 247 (III) adopted by the General Assembly on 7 December 1948, has become a working language of the General Assembly, and

Taking also into consideration that three of the members of the International Law Commission are nationals of Spanish-speaking countries,

Resolves to request the Secretary-General of the United Nations to make the necessary arrangements to ensure that, beginning with the forthcoming session of 1955, there will be also simultaneous interpretation from and into Spanish.

V. CO-OPERATION WITH INTER-AMERICAN BODIES

77. On the proposal of Mr. F. V. García-Amador, the Commission adopted the following resolution:

The International Law Commission,

Considering that according to Article 26 of its Statute, adopted by resolution 174 (II) of the General Assembly,

"The advisability of consultation by the International Law Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized," and

Considering that the Inter-American Council of Jurists and the Tenth Inter-American Conference have taken steps towards the implementation of the foregoing provision,

Resolves to ask the Secretary-General to take such steps as he may deem appropriate in order to establish a closer co-operation between the International Law Commission and the Inter-American bodies whose task is the development and codification of international law.

VI. REPRESENTATION AT THE GENERAL ASSEMBLY .

78. The Commission decided that it should be represented at the ninth session of the General Assembly by its Chairman, Mr. A. E. F. Sandström, for purposes of consultation.

VII. DATE AND PLACE OF THE SEVENTH SESSION
OF THE COMMISSION

79. The Commission decided, after consulting the Secretary-General in accordance with the terms of Article 12 of its Statute and receiving the views of the latter, to hold its next session in Geneva, Switzerland, for a period of ten weeks beginning on 20 April 1955.

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CONTENTS

	PAGE
THE "CONTRACTUAL AGREEMENTS" WITH THE FEDERAL REPUBLIC OF GERMANY. <i>Joseph W. Bishop, Jr.</i>	125
THE FINAL ACT OF THE LONDON CONFERENCE ON GERMANY. <i>Herbert W. Briggs</i> ..	148
REGIONAL ORGANIZATIONS: A UNITED NATIONS PROBLEM. <i>Gerhard Bebr</i>	166
SEDENTARY FISHERIES AND THE AUSTRALIAN CONTINENTAL SHELF. <i>D. P. O'Connell</i>	185
EDITORIAL COMMENT:	
The London and Paris Agreements on West Germany. <i>Josef L. Kunz</i>	210
The Monetary Gold Decision in Perspective. <i>Covey T. Oliver</i>	216
The International Law Commission's 1954 Report on the Regime of the Terri- torial Sea. <i>Philip C. Jessup</i>	221
Preparation for Review of the United Nations Charter. <i>Clyde Eagleton</i>	229
Membership and Representation in the United Nations. <i>Pitman B. Potter</i> ..	234
The Meeting of Consultation of Foreign Ministers as a Procedure of Inter- American Collective Security. <i>C. G. Fenwick</i>	235
NOTES AND COMMENTS:	
Annual Meeting of the Society. <i>E. H. F.</i>	239
The Trieste Settlement and Human Rights. <i>Egon Schwelb</i>	240
Twenty-Sixth Session of the Hague Academy of International Law. <i>E. H. F.</i>	248
Meeting of Inter-American Bar Association Officers. <i>Wm. R. Vallance</i>	249
Ford Foundation Grants. <i>Wm. W. Bishop, Jr.</i>	252
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>Oliver J.</i> <i>Lissitzyn</i>	
	254
BOOK REVIEWS AND NOTES:	
<i>Baty, International Law in Twilight</i> , 271; <i>Schiffer, The Legal Community of Mankind</i> , 272; <i>Castrén, The Present Law of War and Neutrality</i> , 274; <i>Coudert, A Half Century of International Problems</i> , 277; <i>Institute of International Law, Milan, Comunicazioni e Studi</i> , Vol. V, 278; <i>La Pradelle, Politis and Salomon, Recueil des Arbitrages Internationaux</i> , Vol. III, 279; <i>Meyer, Internationale Luftfahrtabkommen</i> , 280; <i>Trygve Lie, In the Cause of Peace</i> , 281; <i>Cheever and Haviland, Organizing for Peace</i> , 282; <i>Upthegrove, Empire by Mandate</i> , 283; <i>Kraus, Die Oder-Neisse-Linie</i> , 284; <i>Hoskins, The Middle East: Problem Area in World Politics</i> , 285; <i>U. S. Naval War College, International Law Documents, 1952-1953</i> , 286.	
Books Received	287
PERIODICAL LITERATURE OF INTERNATIONAL LAW	289
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

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THE "CONTRACTUAL AGREEMENTS" WITH THE FEDERAL REPUBLIC OF GERMANY

A STUDY IN THE ADAPTABILITY OF INTERNATIONAL LAW TO POLITICAL REALITIES

BY JOSEPH W. BISHOP, JR.

Of the New York Bar

At Paris, on October 23, 1954, the United States, the United Kingdom, the French Republic (the "Three Powers") and the Federal Republic of Germany, as part of the salvage operations following the collapse of the plan for a European Defense Community, signed a Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany. The first article of that Protocol provides that, upon ratification by the four signatories, the so-called Contractual Agreements with the Federal Republic of Germany, originally signed at Bonn on May 26, 1952, shall enter into force—with, however, certain amendments contained in five Schedules to the Protocol.¹ Two days later, Secretary Dulles explained to the President, the other members of the Cabinet, and several millions of anonymous television viewers:

... we approved the various agreements and documents which had to deal with this subject of restoring German sovereignty. Rather complicated because of the great many things that have been going on during this past 10-year period which have got to be wound up in an orderly way.²

The Secretary's statement, while incontestable as far as it goes, does less than full justice to a truly remarkable set of international agreements. Drafted in response to an unprecedented international situation, they create a situation which defies classification in terms of ordinary concepts of international law. The primary aim of this supplement to Mr. Dulles' homely remarks is less to analyze than to describe this situation, with particular attention to the status which the Federal Republic will enjoy under the Agreements. A secondary aim is comparison of the Agreements, as signed in 1952, with those which emerged after two years of steady growth in German power and prestige.

The Contractual Agreements include a Convention on Relations between the Three Powers and the Federal Republic of Germany; a Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany; a Finance Convention; and a Convention on the Settlement of Matters Arising Out of the War and the

¹ The full texts of the Contractual Agreements, as originally signed, are contained in Exces. Q and R, U. S. Senate, 82d Cong., 2d Sess., June 2, 1952. The texts of the 1954 Protocol and Amendments appear in Department of State Publication 5659, London and Paris Agreements (November, 1954), pp. 63-122. The Protocol, as of March 15, 1955, is not in force.

² Dept. of State Publication 5659, p. 5.

Occupation. Annexed to the Convention on Relations is the Charter of an Arbitration Tribunal for the hearing of disputes arising under the conventions, and possibly even the settlement of those disputes which involve no important interest of the signatories.

The Contractual Agreements can more easily be understood if they are viewed against the background of the occupation which they will replace. That occupation, which will have completed its tenth year in May, is nearly as unusual and interesting a study in international law and politics as are the Agreements themselves. In general, it may be said that the status of Western Germany immediately preceding the Agreements' entry into force represents about the maximum of adaptation to political exigencies possible within the limits of the traditional concept of occupation. Since 1949, when the Occupation Statute entered into effect,³ the Federal Republic has in practice exercised a very large degree of sovereignty over its domestic and even foreign affairs. But the Three Powers still have, in theory, all the powers which they assumed upon the collapse of the Third Reich.⁴ They can veto German legislation, if it runs counter to their policies, and they can themselves promulgate legislation in any one of the key fields which they reserved to themselves under the Occupation Statute. They maintain a system of courts, exercising jurisdiction not only over their own personnel but also over Germans for violations of occupation laws or offenses against the occupants. Their own personnel enjoy complete extraterritoriality. They can requisition what they need from the German economy. They can at any time revoke the Occupation Statute and restore military government, however unthinkable such a course might be in practice.

Even this occupation is sufficiently anomalous to have provoked a good deal of academic controversy, much of it centering around the applicability of the Hague Regulations. On the whole, the controversy radiated more heat than light. German lawyers, not unnaturally, inclined to the view that the Hague Convention was applicable in its entirety;⁵ American lawyers—especially those who had been connected with the occupation—leaned toward the proposition that Germany's unconditional surrender reduced the Regulations to the status of a code of ethics for occupants, so far as Germany is concerned, rather than binding rules of international law.⁶ Professor Rheinstein, however, came to the conclusion that some of the Hague Regulations were applicable to the occupation of

³ On Sept. 21, 1949, the Allied High Commission declared in force the Occupation Statute, as promulgated on May 12, 1949; Dept. of State Bulletin, Vol. 20 (1949), p. 500; this JOURNAL, Supp., Vol. 43 (1949), p. 172.

⁴ As part of the Final Act of the London Conference, on Oct. 3, the Three Powers stated that their High Commissioners in Germany, pending the entry into effect of the Contractual Agreements, "will not use the powers which are to be relinquished unless in agreement with the Federal Government, except in the fields of disarmament and demilitarisation. . ." Dept. of State Publication 5659, p. 10.

⁵ *E.g.*, Laun, "The Legal Status of Germany," this JOURNAL, Vol. 45 (1951), p. 267.

⁶ *E.g.*, Fahy, "Legal Problems of German Occupation," 47 Michigan Law Review (1948) 1.

Germany as it had evolved by 1948, and some were not, those relating to the rights and duties of the army of occupation and the status of occupation personnel falling into the former category.⁷

Much professorial sweat and lucubration have likewise been devoted to the essentially sterile problems of the nomenclature and classification of the occupation—whether *occupatio bellica*, *occupatio pacifica* or, as Professor Rheinstein suggested, *occupatio ambivalens*.⁸ For American lawyers, at least, answers to these questions for most practical purposes were furnished by the opinion of the Supreme Court in *Madsen v. Kinsella*,⁹ which was concerned with the jurisdiction of a court of the Allied High Commission for Germany after the effective date of the Occupation Statute. Starting from the classic proposition that "... The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent,"¹⁰ the Court had little difficulty in concluding that, while American government in Germany had passed from military to civilian hands and so had ceased, at least in name, to be "military government,"¹¹ it continued to be "a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory."¹²

Since the proceedings at issue in the *Madsen* case had taken place in 1950, the Court did not consider the effect of the joint resolution of Congress, approved by the President October 1, 1951, terminating "the state of war between the United States and the Government of Germany, declared by the joint resolution of Congress approved December 11, 1941."¹³ It is, however, very doubtful that this unilateral action could affect the status of Germany under international law, for its effect was plainly intended to be limited to the domestic law of the United States, such as the Trading with the Enemy Act. It did not purport to end the

⁷ Rheinstein, "The Legal Status of Occupied Germany," *ibid.*, pp. 23, 27. The Supreme Court, in deciding a case which arose after the promulgation of the Occupation Statute and which involved the question of the jurisdiction of the courts of the occupation government, quoted Art. 43 of the Hague Regulations, which obligates the occupant to take all measures in his power to ensure public order and safety. *Madsen v. Kinsella* (1952), 343 U. S. 341, 348. The applicability of the Hague Regulations was not in issue, and the Court may simply have regarded Art. 43 as stating the consensus of opinion on customary international law.

⁸ Rheinstein, *loc. cit.*, at p. 33. The author, in his search for historical analogies, is reduced to such curiosities of the *ius gentium* as the Austro-Hungarian Empire's thirty-year "occupation" of Bosnia and Herzegovina and the medieval practice of pledging territory to a foreign sovereign to secure an obligation.

⁹ 343 U. S. 341 (1952); this JOURNAL, Vol. 46 (1952), p. 556.

¹⁰ Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 801.

¹¹ Exec. Order 10062, June 6, 1949, 14 Fed. Reg. 2965.

¹² 343 U. S. at p. 357.

¹³ Pub. Law 181, 82d Cong., 1st Sess.; Proclamation 2950, 16 Fed. Reg. 10915; this JOURNAL, Supp., Vol. 46 (1952), p. 13.

state of war, under international law, created by Germany's prior declaration of war, but only the situation under United States law created by the resolution of Congress. Moreover, the Proclamation explicitly declared that

the rights, privileges and status of the United States and the other occupation powers in Germany . . . derive from the conquest of Germany and the assumption of supreme authority by the Allies and are not affected by the termination of the state of war.

In summary, then, it may be concluded that, however sweeping the changes in the political situation, in strict legal theory the status of Germany prior to the entry into force of the Agreements is essentially what it was immediately after unconditional surrender and the evaporation of the so-called "Doenitz Government." Although the Government of the Federal Republic is (like the Communist German Democratic Republic in the Soviet Zone of Germany) undoubtedly a *de facto* government within its territorial and political area of jurisdiction, and while (unlike the German Democratic Republic) it is a most important factor in international politics, it derives its powers from Allied military government, which can, again in strict legal theory, at any time and for any reason by unilateral action resume those powers.¹⁴ There is nothing which would irrevocably deprive the occupants of any portion of their supreme authority.

As above indicated, the possibilities of development within the classical concept of occupation had been exhausted, and since 1950 it had become increasingly obvious that the laws of political ecology required further evolution in the status of Western Germany.¹⁵ The salient political facts which led to this conclusion are obvious and may be briefly summarized:

1. Germany is presently divided between East and West; neither the reunification of Germany nor the conclusion of a comprehensive peace treaty is practicable until there is at least a partial settlement of differences between the Communist countries and the democracies.

2. German public opinion makes it practically impossible for any German or foreign politician to admit that war may be the only alternative to a more or less permanent division of Germany and the loss of her territories beyond the Oder.

3. Both Soviet Russia and the Western Powers desire to take advantage of the military potential of their respective parts of Germany; and Soviet Russia, by the establishment of the para-military *Volks-polizei*, has already taken a long step in that direction. From the standpoint of the Western democracies, indeed, some soldiers doubt that the defense of Western Europe is possible without German par-

¹⁴ Sec. 3 of the Occupation Statute reserves to the occupying Powers the right to rescind the Statute.

¹⁵ "In considering the contractual agreements as a whole, it should be borne in mind that they have had to take into account an unprecedented situation. . . . The problem has posed itself of according to the Federal Republic full authority over its internal and external affairs while preserving the means of negotiating German unity and of maintaining the rights of the Three Powers in Berlin." Sen. Exec. Rep. No. 16, 82d Cong., 2d Sess. (Report of the Senate Committee on Foreign Relations on Execs. Q and R), p. 37. This problem has in nowise been diminished by events between 1952 and the present.

ticipation. This includes the availability of bases and similar facilities in Western Germany, as well as actual contribution of German soldiers and arms.

4. Prudence and public opinion in the democracies alike require some type of guarantee against a resurgence in Germany of Naziism or aggressive militarism.

5. A country which is sought as an ally cannot continue to be treated as occupied enemy territory.

The Contractual Agreements represent an effort to reconcile these nearly irreconcilable desiderata. Because they were worked out in response to a set of novel requirements, they are calculated to be the despair of the pundits of international law. The status of Western Germany which would result from their entry into in effect cannot adequately be described in terms of "sovereignty" or "occupation" (whether *bellica* or *pacifica*) or any other terms from the lexicon of that science, though there will no doubt be valiant efforts. They can, indeed, be comprehended only by consideration of what they actually provide, in the light of the five requirements above stated.

1. *Provisions necessitated by the division of Germany and present impossibility of a peace treaty*

"In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement." The *raison d'être* of this quotation from Article 2 of the amended Convention on Relations is clear enough. These are rights which, vis-à-vis Soviet Russia, could not be replaced by any agreement with a government which the Kremlin does not recognize. The conclusion of a formal peace treaty with the Federal Republic and total abandonment by the Western Powers of their occupation of Germany would afford to the Soviets an excellent legal pretext to claim that the Western Powers had not only violated the Potsdam and other World War II agreements, but had abandoned their right to have any further say in the fate of Germany and their right to remain in Berlin. The legal dialecticians of the Soviet Union are rarely at a loss for rationalizations of its *realpolitik*, but there is no reason unnecessarily to simplify matters for them.

A far more difficult problem is presented by a third set of basic rights stemming from conquest and occupation—the rights, in the words of the 1952 Convention on Relations, relating to "the stationing of armed forces in Germany and the protection of their security." Russia is in no position to dispute the right of the Three Powers to station their forces in Germany as occupants, but it could, and probably will, vociferously challenge their right to be there on no other basis than the consent of a government which it does not recognize.¹⁶

¹⁶ Soviet Russia's recent recognition of the "sovereignty" of the so-called German Democratic Republic was not, of course, accompanied by any withdrawal of Russian

The 1952 Convention dealt squarely with the problem; the right to station forces in Germany and to protect their security was specifically included among those retained by the Three Powers. The provisions of the 1954 Convention are a study in the use of ambiguity as a method of avoiding, or at any rate of postponing, the resolution of disagreement. Paragraph 1 of Article 4 now provides that:

Pending the entry into force of the arrangements for the German Defence Contribution, the Three Powers retain the rights, heretofore exercised or held by them, relating to the stationing of armed forces in the Federal Republic.

Thereafter, the matter is to be dealt with by a separate convention, effective upon the accession of Germany to the North Atlantic Treaty, whereby the Federal Republic agrees that "forces of the same nationality and effective strength as at that time may be stationed in the Federal Republic."¹⁷ This, however, is followed by an effort (Article 4(2)) to refute the inference that the Three Powers will have then abandoned their right to station forces in Western Germany:

The rights of the Three Powers, heretofore exercised or held by them, which relate to the stationing of armed forces in Germany and which are retained, are not affected by the provisions of this Article insofar as they are required for the exercise of the rights [relating to Berlin, Germany as a whole, reunification and a peace treaty].

Is the phrase "and which are retained" a bashful affirmation of the proposition that these rights *are* retained—rather than acquired by agreement—even after the entry into force of the arrangements for the German defense contribution? Who can say how far the retention of the right to station armed forces in the Federal territory is essential to the exercise of Allied rights respecting reunification and a peace treaty or the Allied right to remain in Berlin (which is not part of the Federal Republic's territory)? How does this square with the antecedent unequivocal declaration of paragraph 2 of Article 1 that "The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs"? We search farther for enlightenment and find this (Article 4, paragraph 2):

. . . In view of the status of the Federal Republic as defined in Article 1, paragraph 2 . . . and in view of the fact that the Three Powers do not desire to exercise their rights regarding the stationing of armed forces in the Federal Republic, insofar as it is concerned, except in full accord with the Federal Republic, a separate Convention deals with this matter.¹⁸

occupation forces in East Germany, nor has Russia purported to sign a peace treaty with her East German satellite.

¹⁷ The text of the separate Convention on the Presence of Foreign Forces in the Federal Republic of Germany appears at pp. 94-96 of Dept. of State Publication 5659.

¹⁸ The Final Act of the London Conference obligates the United Kingdom, and morally commits the United States, to maintain armed forces in Germany, but says nothing about their *right* to maintain such forces. *Op. cit.*, p. 14.

On balance, this highly ambivalent language *seems* to mean that the Three Powers still retain their right, based on conquest and occupation, to station armed forces in Western Germany, although it is a right which will not be used without the consent of those who are subject to it—like the prerogatives of the British Crown; or it may mean that, to the extent that they have abdicated their rights, the abdication runs only in favor of the Federal Republic; *i.e.*, the Three Powers are, for purposes of international law, still occupants, but West Germany is not occupied. The lawyer's mind may boggle at such concepts; but the validity and meaning of these provisions may never be tested seriously. Article 9(3) excludes disputes involving these rights of the Three Powers, "or action taken thereunder," from the jurisdiction of the Arbitration Tribunal or of any other tribunal or court. Thus, unless and until there arises a real crisis in relations between the Three Powers and the Federal Republic, each party may construe the clause to its own satisfaction, the Germans taking the position that Allied forces are present in their territory only by grace of German consent and the Allies taking the position—especially in discussions with the Russians—that they are there on the same legal basis as before.

In tacit recognition that the Federal Republic cannot be universally accepted as a new sovereign entity, despite the declaration that it will "have the full authority of a sovereign state" (which may not be the same thing as actually *being* a sovereign state), the Three Powers, under Article 3, agree to represent its interests with international organizations and other states, but only at the request of the Federal Republic and when it is not in a position to do so itself. Although not explicitly so stated, the Federal Republic is at liberty to establish and carry on normal diplomatic relations with any countries which will recognize it¹⁹ and to join any international organization to which it can gain admission. Indeed, under the same article, the Federal Republic affirms its intention to join "international organizations contributing to the common aims of the free world," and the Three Powers pledge themselves to support its candidacy "at appropriate times."²⁰

2. Provisions in deference to German desire for reunification

The various documents relating to the Agreements, and the Agreements themselves, are liberally sprinkled with protestations and provisions in-

¹⁹ The Three Powers themselves, under the 1952 Convention, would have conducted their relations with the Federal Republic through ambassadors, who were, however, to "act jointly in matters the Three Powers consider of common concern" under the Contractual Agreements. This provision has vanished from the convention itself—presumably for the same reasons which induced throughout the agreements the replacement of the phrase "The Three Powers and the Federal Republic" by the phrase, "The Signatory States." There seems to be nothing to inhibit joint action in practice, and in fact the quoted provision now appears in a tripartite agreement. Dept. of State Publication 5659, p. 121.

²⁰ In Sec. V of the Final Act of the London Conference the Three Powers declare that "They consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs." *Ibid.*, p. 17.

tended to refute any inference that either the Three Powers or the Federal Republic are resigned to a quasi-permanent division of Germany into two new and more or less hostile states. The Three Powers declared in the Final Act of the London Conference that "The achievement through peaceful means of a fully free and unified Germany remains a fundamental goal of their policy."²¹

Both Article 2 and Article 7 contain references to "Germany as a whole," *i.e.*, recognition that Germany, at least as she existed before Hitler's conquests and annexations, is still an international concept, if not an actuality; in abeyance, but not extinguished.²² Article 7, indeed, is almost wholly devoted to dispelling the idea that the new relationship of the Western Powers to Western Germany marks the abandonment of plans for reunification.²³ The Three Powers and the Federal Republic will co-operate to achieve by peaceful means a unified Germany; and the Three Powers will "consult with" the Federal Republic on the exercise of their (retained) rights regarding Germany as a whole.

But suppose Germany actually *is* unified; what then becomes of the elaborate system of rights and duties embodied in the Contractual Agreements? The Convention on Relations does not, and probably could not, supply an unambiguous answer. Article 7(3) of the 1952 version provided in effect that this new Germany would be "extended" the rights of the Federal Republic under the Contractual Agreements (and the EDC Treaty) upon its assumption of the Federal Republic's obligations thereunder. Taken by itself, this would have been open to the construction that the government of the new Germany was to have a choice of ratifying or rejecting the Federal Republic's accession to the Contractual Agreements (and the E. D. C.); and it may be remarked in passing that it is not very easy to conceive circumstances in which Soviet Russia would consent to the reunification of Germany on terms which would leave the new government any such choice. This has vanished, and the problem is dealt with only by Article 10, which provides that the four signatories will "review" the terms of the Contractual Agreements upon "the reunification of Germany, or an international understanding being reached

²¹ *Ibid.*

²² Cf. Laun, "The Legal Status of Germany," this JOURNAL, Vol. 45 (1951), pp. 267, 268-272. The author, a German lawyer, devotes much time, learning and ingenuity to the elaboration of the argument that Germany, not having been formally annexed by any of the conquerors, still exists, despite the creation of the Federal Republic and the German Democratic Republic, and that this continued existence is recognized by many acts of both the Western democracies and the Communist Powers, such as the continued existence of the Quadripartite Control Authority (also in abeyance), the many references in the legislation of the occupying Powers to "Germany as a whole" and the reference, contained in the Basic Law (*Grundgesetz*) of the Federal Republic to a future Constitution (*Verfassung*) to be agreed upon by the whole German nation.

²³ The 1954 amendments substitute the words "reunified" and "reunification" for "unified" and "unification" in a number of instances, *e.g.*, Convention on Relations, Arts. 7(2), 10. The psychology of this refinement is unclear; perhaps it is intended to connote the restoration of Germany as she existed before Hitler, including East Prussia and Silesia.

with the participation or consent of the States parties to the present Convention on steps towards bringing about the reunification of Germany, or the creation of a European federation; or in any situation which all of the Signatory States recognize has resulted from a change of a fundamental character" from present conditions. Thereafter they will modify the conventions "to the extent made necessary or advisable by the fundamental change," but only by mutual agreement.

This implies more than it says, although the implications are far from clear. It seems, indeed, to be founded on the premise that the Government of the Federal Republic will be the government of a reunified Germany, and that the Federal Republic will be bound by its present commitments, except to the extent that the Three Powers consent to their modification.²⁴ The United States appears to put this construction on Article 10, for the Secretary of State's letter transmitting to the President the amendments to the conventions states that, in the event of review consequent upon reunification or an international understanding on steps toward that goal, "There must, of course, be agreement by all the signatory governments to any changes made in the conventions."²⁵ It is apparently not the view of the Government of the Federal Republic, whose legal experts are reported to have taken the position that the conventions would be "invalid and inapplicable" after German reunification.²⁶

These provisions appear to be essentially:

- (a) Earnest declarations that the reunification of Germany remains a basic goal;
- (b) Provisions treating such reunification as a real possibility; and
- (c) Provisions (the same ones) which give to the Three Powers in the event of unification rights which they could not insist upon without jeopardizing the prospect of removal of Soviet obstruction to reunification.

Although this essay is devoted to the genuine politico-legal problems arising from the new relationship of Western Germany to the Western democracies, rather than to the highly artificial relationship between the Soviet Svengali and its East German Trilby, it should be pointed out that the Soviet Union, while constantly emitting propaganda in favor of German reunification, has caused the German Democratic Republic to assume commitments much more prejudicial to the chances of peaceful reunification, notably its formal acceptance of the Oder boundary and the concomitant territorial cessions to Poland and Russia. Article 7(1) of the Convention on Relations, on the other hand, commits the democracies to the proposition that "the final termination of the boundaries of Germany" must await a peace settlement.

²⁴ Disputes under Art. 10 are not among those which Art. 9 exempts from the jurisdiction of the Arbitration Tribunal. Conceivably it could be argued that Art. 10 is an agreement to agree, or at least to bargain in good faith, and that the Federal Republic could bring before the Tribunal an arbitrary refusal by the Three Powers, or any one of them, to consent to modifications which are reasonably necessary, or even "advisable," in the light of some fundamental change.

²⁵ New York Times, Nov. 16, 1954, p. 12; Dept. of State Bulletin, Vol. 31 (1954), pp. 851-852.

²⁶ New York Times, Dec. 21, 1954, p. 6.

At the same time, there is a concession to the not very realistic fear in the back of the French (and perhaps the Russian) mind that a rearmed Germany might be tempted to launch an armed crusade for the recovery of her lost territory, dragging her new partners with her: as part of the Final Act of the London Conference, the Federal Republic undertook "never to have recourse to force to achieve the reunification of Germany or the modification of the present boundaries of the German Federal Republic."²⁷ Moreover, in the same instrument, the Three Powers stated that they will regard as a threat to their own safety any recourse to force which threatens the defensive character of the Atlantic Alliance, and would consider a government which so offended as having forfeited its right to military assistance under NATO.²⁸ There is also a much more substantial concession to the much more substantial fear that the Federal Republic might play off the West against the Soviets, bargaining the abrogation of her commitments to the former in exchange for reunification and the recovery of her territories from the latter, for the inability of the Federal Republic to modify its obligations under the Agreements without the consent of the Three Powers means that they cannot be excluded from any negotiations with the Soviet Union.

3. *Provisions relating to Western defense*

The positive satisfaction of this political exigency, *i.e.*, arrangement for the contribution of German manpower and matériel to the common defense, is handled through the mechanism of the Brussels and North Atlantic treaties and is beyond the scope of this article. But it was no less essential to provide for the continued stationing in Germany of the forces of the other Western Powers and to regulate the rights and duties of such forces. This problem (which, of course, did not exist under the occupation) had to be dealt with by the Contractual Agreements.

As noted above, the Three Powers seem to retain, under Article 4, the right to station armed forces in Germany, although their mission is changed from occupation to "the defense of the free world, of which Berlin and the Federal Republic form part." But, without the consent of the Federal Republic, there can be no increase in the effective strength of these forces.²⁹ Moreover, the NATO Council, implementing the decisions of the London Conference, has agreed that the location of NATO forces, *i.e.*, those forces of NATO countries stationed on the Continent and under the command of SACEUR (the NATO supreme commander), is to be determined by SACEUR "after consultation and agreement with

²⁷ Dept. of State Publication 5659, p. 16. ²⁸ *Ibid.*, p. 17.

²⁹ Art. 4(2); separate Convention on the Presence of Foreign Forces, Art. 1(2). Curiously enough, Art. 5(1)(b) of the Convention on Relations provides that, "in the event of external attack or imminent threat" thereof, the Three Powers may bring in, as part of their forces, contingents of the armed forces of any nation not now providing such contingents, without the Federal Republic's consent. No such provision is made for additional contingents of the Three Powers' own forces.

the national authorities concerned."³⁰ Presumably these "national authorities" include not only those of the country whose forces are concerned, but also those of the prospective host country; but it is not clear to what extent NATO will "recognize as suitable to remain under national command" and hence not under the authority of SACEUR,³¹ American, French or British forces now stationed in Germany.

If the Three Powers are to commit very substantial forces in Germany, and if these forces no longer have the status of occupants, a serious problem arises as to their security in the event of external attack, internal subversion, or other situations in which martial law might be appropriate. The 1952 Conventions dealt unambiguously with this thorny problem. Article 5 of the Convention on Relations, 1952 version, in substance provided for a restoration of the occupation regime whenever the Three Powers believed that the security of their forces was endangered—whether that danger stemmed from external aggression or from such an extreme development in German internal politics as an electoral triumph by neo-Nazis or Communists.³² In such case, the Three Powers would have had the power to "proclaim a state of emergency in the whole or any part of the Federal Republic." This was a polite way of saying "reinstate the occupation," for upon such a proclamation the Three Powers were empowered to "take such measures as are necessary to maintain or restore order and to insure the security of the Forces"—a phrase which fairly measures the powers of a military occupant under conventional concepts of international law.³³ Moreover, Article 5(7) of the 1952 Convention on Relations would have expressly provided that, even without the proclamation of a "state of emergency," any military commander whose forces were "immediately menaced" could take whatever action, including the use of armed force, was necessary to protect them.

Under the 1954 draft, these rights are considerably less clear-cut. Article 5(2) now provides that:

The rights of the Three Powers, heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained, shall lapse when the appropriate German authorities have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the

³⁰ Dept. of State Publication 5659, pp. 32-33.

³¹ *Ibid.*

³² Art. 5(2) of the 1952 Convention on Relations defined as follows the circumstances which would justify the Three Powers in resuming control:

". . . an attack on the Federal Republic or Berlin, subversion of the liberal democratic basic order, a serious disturbance of public order or a grave threat of any of these events, and which in the opinion of the Three Powers endangers the security of their forces . . ."

³³ "Thus the occupant's rights are double-based, resting on the necessity for providing some established government in a country which is shut off from its ordinary fountain of justice and spring of administration, and secondly, on the military interests of the occupying belligerent himself." Spaight, *War Rights on Land* (1911), p. 322. See also Garner, *International Law and the World War* (1920), Vol. II, p. 77 *et seq.*

ability to deal with a serious disturbance of public security and order. To the extent that such rights continue to be exercisable they shall be exercised only after consultation, insofar as the military situation does not preclude such consultation, with the Federal Government and with its agreement that the circumstances require such exercise. In all other respects the protection of the security of those forces shall be governed by the Forces Convention or by the provisions of the Agreement which replaces it, and, except as otherwise provided in any applicable agreement, by German law.

Taken literally, this provision seems to mean that the Three Powers will "temporarily" retain the right to proclaim a "state of emergency" and, in effect, restore military government, if they believe such actions requisite to the security of their forces, for they certainly hold such rights as occupants. What is not so clear is the point at which "the appropriate German authorities" can be said to have "obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces." The vesting in the German Federal Government of emergency powers, similar to the powers under international law of a conqueror's military government, raises exceedingly difficult questions of politics and constitutional law. For example, does the "ability to deal with a serious disturbance of public security and order" include constitutional authority to set aside an election won by neo-Nazis or Communists? Two propositions may, however, be put forward with reasonable assurance:

(1) The military authorities of the Three Powers will continue for the foreseeable future to regard themselves as possessed of comprehensive powers to deal with any emergency which they believe endangers the security of their forces.

(2) If the questions of the extent of these powers and the point at which they lapse should ever become more than academic, they will not be resolved by lawyers. As is the case with the right to station forces in Germany, disputes involving the right to protect their security, "or action taken thereunder," are excluded by Article 9(3) from the jurisdiction of the Arbitration Tribunal or any other tribunal or court.

These conclusions are pointed up by the reasons assigned for the deletion of paragraph 7 of Article 5 which, as above noted, would have explicitly authorized any military commander to take any action necessary to protect his forces against an immediate threat. A "related letter" from the German Chancellor to the United States Secretary of State³⁴ says that "The Federal Government is of the opinion that this is the inherent right of any military commander according to international law and therefore German law."

Similarly, the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany, even as revised, goes farther to insure the extraterritoriality of the "foreign forces" than would be the case under the NATO Status of Forces Agree-

³⁴ Dept. of State Publication 5659, p. 99.

ment.³⁵ Although it is to be replaced by "new arrangements setting forth the rights and obligations of the Three Powers and other States having forces in the territory of the Federal Republic," which are to be "based on" the NATO Agreement ("supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic"),³⁶ it is obvious that the working out of the new agreement will not be easy. The probability that the Forces Convention will not be superseded for a considerable time is strong enough to justify detailed consideration of its provisions, which were not much altered by the 1954 Protocol.

Contrary to the situation under the NATO Agreement, the Three Powers retain what is for all practical purposes exclusive criminal jurisdiction over the members of their forces.³⁷ The German authorities can arrest members of the forces only in emergencies, and then must turn them over promptly to their own authorities. Although the German courts are given civil jurisdiction over members of the forces,³⁸ they cannot restrict their personal liberty, nor seize any personal property which the military authorities certify as necessary for the performance of a member's duties.³⁹

In other respects also, the Forces Convention confers on the Allied Forces rights which, while much more circumscribed than those which they have enjoyed as avowed military occupants, nevertheless go beyond anything which a NATO Power would be likely to obtain in the territory of another NATO Power. Thus, Article 3(3) and Annex A of the Forces Convention in effect amend and supplement the German Penal Code by making criminal all sorts of offenses against the forces, ranging from

³⁵ The text of the NATO Agreement is reproduced in Exec. T, 82d Cong., 2d Sess., June 16, 1952; also in this JOURNAL, Supp., Vol. 48 (1954), p. 83. See Schwartz, "International Law and the NATO Status of Forces Agreement," 53 Columbia Law Review (1953) 1091.

³⁶ Convention on Relations, Art. 8(1)(b).

³⁷ Art. 6(1). Art. 6(4), however, provides for the transfer of such cases to German jurisdiction, by agreement between the German authorities and the authorities of the forces. The Supreme Court of the United States has said that members of an invading or occupying force are "not subject during the war to the laws of the enemy or amenable to his tribunals for offenses committed by them." *Coleman v. Tennessee* (1879), 96 U. S. 513. Although it is by no means clear that the Supreme Court, even in 1879, would have applied this dictum to a situation in which the occupying government had agreed to subject members of its forces to local courts, any attempt so to transfer to German jurisdiction a member of the United States Forces—which includes dependents—might lead to an attempt to litigate in the American courts the question whether the war and the occupation have been terminated for legal purposes.

³⁸ Art. 9. It can also be argued that, at least under the American view of international law, members of an occupying force cannot be subjected even to the civil jurisdiction of "enemy" courts. *Cf. Dow v. Johnson* (1880), 100 U. S. 158. However, it is very doubtful that the immunity is so personal to the individual that it cannot be waived by the authorities of the occupying government. Thus, it appears that after World War I the American occupation authorities subjected members of their forces to the civil jurisdiction of German courts in paternity cases. See *American Representation in Occupied Germany, 1920-1921*, Vol. II, p. 60. In any case, it would seem almost impossible to get the issue before an American court, except through a collateral attempt to enforce the judgment of a German court.

³⁹ Art. 10(3), (4).

espionage and sabotage to publicly vilifying them or maliciously exposing them to contempt,⁴⁰ although the provision that the German authorities shall have exclusive jurisdiction over offenses against the forces by Germans⁴¹ certainly represents a considerable derogation from the ordinary authority of a military occupant.

A few further examples may be adduced, without attempting exhaustively to recapitulate the elaborate provisions of the convention. The forces, their members and their vehicles, vessels and aircraft can move into, within and out of Western Germany without restriction.⁴² The forces can establish their own communications facilities so far as required for military purposes; and this includes radio communications, despite the scarcity of radio frequencies.⁴³ They can conduct maneuvers and training exercises throughout the Federal territory.⁴⁴ Their installations and works "directly serving the purposes of defense"—which, presumably, would include a minefield or a chain of concrete pillboxes—are to be constructed by the Federal Republic, as needed, or if there is special need for secrecy or security, the forces can construct them themselves.⁴⁵ The Three Powers can, subject to review by an impartial arbitrator, veto on grounds of security a German decision to grant the request of a foreign sovereign for extradition.⁴⁶

Article 30(2), not in itself of great importance, deserves special attention as a type of the numerous instances in which close bargaining between Allied and German negotiators has led to a mean between the rights of an occupant and those of a mere visitor. It provides in essence that in areas outside cities, if the German authorities cannot meet military standards of purity of the water supply, the forces themselves may purify the supply, whereas in cities there must be agreement with the municipal authorities on standards of purification. Some knowledge of the history of the occupation is requisite to full understanding of the significance of this compromise. The medical corps of the Allied Armies, particularly the American, have been strongly of the opinion that local water supplies

⁴⁰ The inclusion of these detailed provisions is attributable less to Allied hypercaution than to the fact that the Federal Republic, having no armed forces, has no legislation dealing specifically with offenses against them. The statutes dealing with offenses against the *Wehrmacht* of the Third Reich were, of course, among those repealed by the Allies at the outset of the occupation. Otherwise it would have been enough to provide that offenses against the forces of the Three Powers should be assimilated to offenses against the Federal Republic's own armed forces.

⁴¹ Art. 6(3).

⁴² Arts. 17(1), 25. This is presumably subject to the overall limitation on the strength of such forces provided by the separate convention. See above, p. 130.

⁴³ Art. 18(2), (5); Annex B.

⁴⁴ Art. 19(1). The separate convention (Art. 1(3)) permits additional forces to enter and remain for periods up to 30 days in connection with NATO training activities, but only with German consent.

⁴⁵ Art. 20(1). Here too, however, there is a substantial subtraction from the usual rights of an occupant, in that such measures, if they are likely to cause serious damage to public or private property, as would often or usually be the case, are subject to review by the Arbitration Tribunal. Art. 20(3).

⁴⁶ Art. 27.

should be chlorinated, in the interest of public health. They could and did cite alarming instances of contamination of untreated water supplies. The German authorities, from the *polizei* up to the *Bundeskanzler*, believed with equal fervor that chlorination was a slur upon the purity of German water and, what was worse, ruinous to the flavor of German beer. Trivial as the controversy might seem, it has been a source of real friction since the inception of the occupation. Article 30(2) probably represents the most satisfactory possible compromise, considering that most beer is brewed in large cities and most troops are stationed outside such cities.

The Forces Convention's articles on logistics give the Allied Forces a good deal less than the rights of an occupant and something more than the privileges of a visitor. All property requisitioned by the forces prior to the effective date of the convention will remain in their possession as long as needed.⁴⁷ The power to requisition will be replaced by the Federal Republic's obligation to make available necessary accommodations, goods and services.⁴⁸ To insure the Federal Republic's ability to honor this commitment, it obligates itself to enact legislation implementing its right of eminent domain; pending such enactment the convention revives *pro tanto* the provisions of the former laws of the Third Reich which assured the supply of the *Wehrmacht*.⁴⁹

To the extent that German supplies and services prove inadequate, the forces may freely import their own supplies and maintenance personnel into the Federal territory. Where this does not suffice, they may import their own contractors, and even, in effect, assimilate them to units of the forces⁵⁰—a privilege not accorded, for example, to United States Forces in France.

4. Provisions designed to insure against a revival of totalitarianism or militarism

The problem of preventing German rearmament from getting out of hand is outside the scope of the conventions, in either their 1952 or 1954 versions, and of this article. Indeed, Article 2 of the Protocol on the Termination of the Occupation provides that "The rights heretofore held or exercised [by the Three Powers] relating to the fields of disarmament and demilitarization shall be retained and exercised by them." Control of German rearmament is to be accomplished within the framework of the Brussels Treaty by a series of Protocols signed at Paris contemporaneously with the Protocol on Termination of the Occupation.⁵¹ Briefly stated, the

⁴⁷ Art. 48. But "rights relating to hunting and fishing heretofore requisitioned" are to expire one month after the entry into force of the convention (Art. 46(5)). Members of the Occupying Forces have been able to hunt the expensively conserved game of Germany when and as they liked, subject only to the conservation regulations imposed by their own authorities. This issue, like that of chlorination, has aroused irritation on out of all proportion to its intrinsic importance, perhaps because there are so many Nimrods among high Allied and German officials.

⁴⁸ Art. 37(1), (2). See below, p. 146. ⁴⁹ Art. 37(3), (4).

⁵⁰ Art. 36(2), (3).

⁵¹ Dept. of State Publication 5659, pp. 37-62.

Federal Republic, which becomes one of the Brussels Treaty Powers, commits itself not to manufacture in its territory atomic, chemical or biological weapons, nor (except upon recommendation of NATO, approved by two thirds of the Brussels Treaty Powers) guided missiles, heavy warships, or bomber aircraft. The Brussels Treaty Powers will establish an "Agency for the Control of Armaments" to satisfy itself that these undertakings are observed. These provisions are not essentially different from those which were envisioned in 1952, save for the replacement of E. D. C. by the Brussels Treaty mechanism.

Much more interesting is the omission of any provision explicitly dealing with the danger of a revival of totalitarianism. Article 5(2) of the 1952 Convention on Relations would have made a "subversion of the liberal democratic basic order," which in the opinion of the Three Powers endangered the security of their forces, one of the grounds for declaration of a state of emergency and concomitant restoration of military government. No such explicit provision now appears. But, as noted above, the "temporary" retention by the Three Powers of their rights relating to the security of their forces may come to very much the same thing. A totalitarian government of Germany might not necessarily endanger the security of the Three Powers' forces; but the decision as to whether or not it did would apparently be up to the Three Powers. The most that can be said is that, so long as the Three Powers maintain in Germany armed forces stronger than any at the disposal of German neo-Nazis or Communists, there would be legal justification for their intervention to prevent the accession to power of a new Hitler of the right or left.

5. Provisions designed to recognize and implement the new relationship between the Allies and Western Germany

The problem of making official the new and radically different relation between the conquerors and the conquered was encountered principally in the negotiation of the Convention on Relations (and the annexed Charter of the Arbitration Tribunal) and the Convention on the Status of Forces. (The Convention on the Settlement of Matters Arising Out of the War and the Occupation deals with matters which should have figured in a peace treaty, and disposes of most of them in much the same way as such a treaty would probably have done. The Finance Convention is essentially an international bargain, not dissimilar to many struck among the NATO Powers, concerning the size of Western Germany's monetary contribution to the upkeep of the forces stationed in her territory for her protection.)

As part of the Final Act of the London Conference, the Three Powers recognized "that a great country can no longer be deprived of the rights properly belonging to a free and democratic people."⁵² Accordingly, the Convention on Relations leads off by terminating the occupation regime, revoking the Occupation Statute and abolishing Allied organs of govern-

⁵² Dept. of State Publication 5659, p. 10.

ment in Western Germany.⁵³ It then states flatly that "The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs."⁵⁴ Although, as has been pointed out above, this resounding declaration is somewhat qualified by succeeding provisions, the limitations on German sovereignty are certainly held to a minimum.

The limits on the sovereignty of the Federal Republic over its external affairs are mainly either those implicit in the fact that no final treaty of peace can be concluded,⁵⁵ or such as any sovereign nation may by treaty with its equals impose upon itself. The Federal Government's various obligations under the conventions to enact, or not to repeal, certain legislation, would, when taken in conjunction with the enforcement powers which the Arbitration Tribunal had under the 1952 conventions, have constituted a real limitation on its sovereignty in domestic matters. For example, there has been mentioned in connection with the Forces Convention the obligation of the Federal Republic to enact certain legislation necessary to the fulfillment of its obligations to the forces. To select another example, it has committed itself, under the Convention on the Settlement of Matters Arising out of the War and the Occupation, not to repeal or amend, without the consent of the Three Powers, certain legislation of the Allied High Commission dealing with reparations.⁵⁶ Allied laws providing for the breakup of certain industrial cartels (although fewer of them than in the 1952 version of that convention) are to be maintained in force until their purposes have been achieved.⁵⁷ Other provisions deal with such matters as the disposition of German war criminals and other persons sentenced by Allied tribunals,⁵⁸ the restitution of foreign property stolen by the Nazis,⁵⁹ and the protection of foreign interests in Germany,⁶⁰ and there is a general provision that:

Legislation . . . which is required to be maintained in force [by any of the conventions] may only be amended or repealed with the consent of the Three Powers.⁶¹

The Charter of the Arbitration Tribunal would, in its 1952 version, have put real teeth in these restrictions on German sovereignty, for that body was given extraordinary powers to enforce the provisions of the treaties. Specifically, it was empowered, if a party failed to "issue legal provisions" required under the conventions, to incorporate in its judgment "provisions, not inconsistent with the Basic Law of the Federal Republic, creating rights and obligations for all persons and authorities in the

⁵³ Art. 1(1).

⁵⁴ Art. 1(2).

⁵⁵ "The problem has posed itself of according to the Federal Republic full authority over its internal and external affairs while preserving the means of negotiating German unity and of maintaining the rights of the Three Powers in Berlin." Sen. Exec. Rep. No. 16, 82d Cong., 2d Sess., p. 37.

⁵⁶ Convention on the Settlement of Matters Arising Out of the War and the Occupation, Ch. 6, Art. 2.

⁵⁷ *Idem*, Ch. 1, Arts. 9, 11.

⁵⁸ Ch. 1, Arts. 6, 7.

⁵⁹ Ch. 5.

⁶⁰ Ch. 10.

⁶¹ Ch. 1, Art. 1.

Federal territory,"⁶² *i.e.*, having the force of a statute. Moreover, if it had found an Act of the German legislature to be in conflict with the conventions, it could have declared it "null, in whole or in part, in the Federal territory."⁶³

This bold attempt to break new ground in the enforcement of obligations among nations, dismissed by Secretary Dulles as "not normal to a body created to arbitrate disputes between sovereign states,"⁶⁴ has vanished without a trace and been replaced with a provision which is, even by the standards of past efforts to enforce treaties, of almost unique futility. Article 11(2) of the Charter now reads, *verbatim ac litteratim*:

If a Signatory State required by a decision of the Tribunal to take action to give effect to that decision is unable, or fails, to take such action within the time specified by the Tribunal, or if no time is specified, within a reasonable time, then that State, or any other Signatory State a party to the dispute, may apply to the Tribunal for a further decision as to alternative action to be taken by the defaulting State.

The decision as to alternative action would presumably be subject to the same provision, and so on *ad infinitum*.

The Federal Republic is not even under a moral obligation to refrain from repealing or amending such legislation of the Occupying Authorities as is not specifically covered by the conventions.⁶⁵ Legislation of the long dormant Quadripartite Control Council presented more of a problem, for the Three Powers could not well permit the Federal Republic to repeal what they could not themselves, without Soviet participation, formally repeal. They do, however, delegate to the Federal Republic the power (exercised by themselves since the collapse of quadripartite government of the occupied territory) to "deprive of effect" such legislation after "consultation" with the Three Powers.⁶⁶ Perhaps the distinction between killing a statute by repeal and throwing it into a cataleptic state by "depriving it of effect" has conceptual validity; but it is not likely to make much practical difference.

Such restrictions as exist on the Federal Republic's sovereignty over its domestic affairs are thus dependent on whatever moral sanction may attach to a decision by the Arbitration Tribunal. The Charter of that court contains genuine recognition of German claims to be placed on a footing of equality.

The composition of the Tribunal ensures its impartiality—three Germans, three Allies and three "neutrals."⁶⁷ If anything, the Germans have the

⁶² Charter of the Arbitration Tribunal (Annex B to the Convention on Relations, 1952), Art. 11(6).

⁶³ *Idem*, Art. 11(3).

⁶⁴ New York Times, Nov. 16, 1954, p. 12; Dept. of State Bulletin, Vol. 31 (1954), p. 851.

⁶⁵ Convention on Settlement, etc., Ch. 1, Art. 1(1).

⁶⁶ Ch. 1, Art. 1(2).

⁶⁷ "Neutral members," who cannot be either Germans or nationals of any of the Three Powers, are to be appointed by agreement between the Federal Republic and the Three Powers or, in default of such agreement, by the President of the International Court of Justice. Charter, Art. 1(2), (3).

better of it, for the German members would be more likely to vote as a bloc than would the members appointed by the Three Powers. In all other respects the Federal Republic and the Three Powers stand on a footing of equality before the Tribunal, so far as its jurisdiction extends.

To the scope of that jurisdiction there are two major exceptions. In the first place, certain disputes between the Federal Republic and the Three Powers are excluded from the Tribunal's competence by provisions of the conventions themselves. The most important such exceptions are disputes involving the rights of the Three Powers with respect to Berlin and Germany as a whole, including the reunification of Germany and a peace settlement; their rights relating to the stationing of armed forces in the Federal Republic (pending the entry into force of the arrangements for a German defense contribution and thereafter insofar as they are necessary to the exercise of rights respecting Berlin, reunification and the peace treaty); and their rights relating to the protection of the security of their armed forces in the Federal territory.⁶⁸ Not only are disputes involving these rights exempted, but also disputes involving action taken under the provisions relating to these rights. The precise wording of these exceptions deserves (and undoubtedly got from the negotiators) the most concentrated attention, for it appears to be intended to exclude the Arbitration Tribunal from even passing on its own jurisdiction over a dispute arising from an action which the Three Powers assert to be an exercise of these rights.

The Tribunal has jurisdiction only over disputes arising "under the provisions" of the conventions.⁶⁹ The Three Powers would undoubtedly take the position that a dispute as to the scope of the retained powers does not arise "under" that or any other article, for the rights themselves are not conferred by the convention—it merely recites their retention. Moreover, the mere assertion by the Three Powers that a particular action was an exercise of these rights would *ipso facto* "involve" these rights in the dispute. The same consideration would apply to the propriety of measures taken by the Three Powers in the exercise of their right to protect the security of their armed forces stationed in the Federal territory.

A few other Allied actions are immune from review by the Arbitration Tribunal, the most significant probably being the exercise—or non-exercise—by the Power which tried and sentenced a war criminal of its exclusive prerogative to terminate or reduce that sentence.⁷⁰

The Convention on Relations complements its revocation of the Occupation Statute by a declaration⁷¹ that the mission of the Three Powers' armed forces stationed in the Federal territory "will be the defence of the free world, of which Berlin and the Federal Republic form part." This announced change of mission, from occupation to defense, is imple-

⁶⁸ Convention on Relations, Art. 9(3). ⁶⁹ Charter, Art. 9(1).

⁷⁰ Convention on Settlement of Matters Arising out of the War and the Occupation, Ch. 1, Art. 6. The Power in question is bound to follow a unanimous recommendation of the Mixed Board set up to review such cases, but that Board includes a representative of each of the Three Powers.

⁷¹ Art. 4(1).

mented by the Forces Convention which, while devoted to matters considerably less fundamental than those dealt with in the Convention on Relations, regulates those aspects of the Allied-German relationship which impinge most acutely on the consciousness of the average German. His relationship with the Allied Armed Forces, which are the highly visible symbols of their countries, will be the touchstone by which he judges how much substance there is to the concept of equal partnership between his country and the Western democracies.

It has been pointed out in a preceding section that the Allied Forces would, under the Forces Convention, occupy a more favored position than would, for example, the forces of one NATO Power in the territory of another. But their position is, on the whole, still farther removed from that of a military occupant, who can, generally speaking, take in the occupied territory any measures which can be justified on grounds of security, furthering the accomplishment of its mission, or the maintenance of public order. Although it is impossible within the scope of this article to recapitulate the provisions of the Forces Convention, it is illuminating to abstract a few of its provisions which deviate most significantly from the rights normally exercised by a military occupant.

Except as the conventions may otherwise provide, the members of the forces are to observe German law, and the forces are to be responsible that it is enforced against them.⁷² Moreover, as the single exception to the exclusive criminal jurisdiction of the Three Powers over the members of their armed forces, if for any reason the courts-martial of the Power concerned lack criminal jurisdiction over a member who has committed against Germans an act which is a crime under German law, a German court may try him and, upon conviction, sentence him to imprisonment in a German jail.⁷³ These provisions, however strongly they emphasize the "guest" status of the quondam occupants, are mainly declarations of principle emphasizing the abrogation of the absolute rule that members of an occupying force are exempt from the criminal jurisdiction of the courts of the occupied territory,⁷⁴ for the German authorities are bound to abstain from prosecuting any such case in which German law gives them discretion to abstain, or in which the offender has been suitably punished by the disciplinary action of the forces,⁷⁵ although, in the latter case, the adequacy of the punishment would be subject to review by the Arbitration Tribunal. Moreover, so far as the United States is concerned, it is difficult to conceive of a violation of German law, so serious that disciplinary punishment under Article of War 15 would be inadequate,⁷⁶ which would not also violate one or another of the Articles of War, if only that which denounces "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed

⁷² Art. 2(1).

⁷³ Art. 6(2), (5).

⁷⁴ See note 37 above.

⁷⁵ Art. 6(2)(b).

⁷⁶ Such punishments, imposed by commanding officers for "minor offenses" not warranting a court-martial, include withholding of privileges, restriction to limits, and forfeiture of half a month's pay (in the case of officers) or reduction to the next inferior grade (in the case of enlisted men). The Articles of War appear at 50 U.S.C. §§ 551-736.

forces. . . ."⁷⁷ The same comment applies to the obligation of the Three Powers to prosecute offenses by members of the forces against Germans as vigorously as offenses against their own personnel, for this would be their responsibility in any case, both as part of their obligation to maintain public order and safety and in the interest of preserving the discipline of their forces. Similarly, the surrender by the Three Powers of their jurisdiction to try offenses against their forces by Germans and other persons subject to German jurisdiction underscores the end of the occupation but does not mark a great departure from the practice which has for some time prevailed.⁷⁸

Of much greater practical effect is the subjection of members of the

⁷⁷ Art. of War 134. See Manual for Courts-Martial, United States (1951), p. 383. A complex jurisdictional problem might arise where a member of the forces commits a serious offense against German law and is discharged before apprehension. If he were a member of the United States Forces and the offense were punishable by imprisonment for 5 years or more, he could probably be subjected to the jurisdiction of a court-martial under Art. of War 3; but the Germans could probably also claim jurisdiction, since he is no longer a member of the forces and since Art. 3(2) of Ch. One of the Convention on the Settlement of Matters Arising Out of the War and the Occupation, which deprives German courts of jurisdiction of acts of which they would not have had jurisdiction at the time of commission, applies only to those acts antedating the entry into force of the convention.

⁷⁸ Art. 6(5) provides in substance that the Germans may transfer to the authorities of the forces, with their consent, jurisdiction in cases in which an offender against the forces is, although subject to German jurisdiction, not a German; *e.g.*, a Russian saboteur or spy whose trial might embarrass the Federal Republic. It is not entirely clear that an American court-martial would have adequate jurisdiction in such a case. Art. of War 2(12) gives to courts-martial, subject to the provisions of any treaty to which the United States is a party, jurisdiction over "all persons within an area leased by or otherwise reserved or acquired for the use of the United States" outside its territories and possessions, but this could hardly include any territory in Germany save, perhaps, the precincts of a military installation. Art. of War 106 gives general courts-martial and military commissions jurisdiction over "any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States . . . or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere. . . ." The 1951 Manual for Courts-Martial states (at p. 341) that it is necessary to prove intent to communicate information to the "hostile party" or "enemy." Assuming that, for this purpose, "time of war" will continue until the conclusion of a formal peace treaty with Germany, a question arises as to whether the Soviet Union and its satellites could, for the purposes of the article, be considered the "enemy" or even "the hostile party." The same problem arises with Art. of War 104, "Aiding the Enemy." The Three Powers are, however, permitted to maintain in the Federal Territory "tribunals exercising jurisdiction as contemplated" by any of the conventions. Convention on the Settlement of Matters Arising out of the War and the Occupation, Ch. 1, Art. 4(1). If it were concluded that a court-martial, applying the Articles of War, could not deal adequately with such an offense, recourse might be had to a military commission, whose jurisdiction to protect the security of forces under the command of the authority which appoints it is, while not clearly defined, less circumscribed than that of a court-martial. See Fairman, *The Law of Martial Rule* (2d ed., 1943), pp. 265 ff., 271 ff. On the other hand, if a German court attempted to try a member of the Soviet forces, he could argue that his government has never terminated its status as a military occupant of Western Germany and that he is, as a matter of international law, immune to the jurisdiction of a German court.

forces to German civil jurisdiction, the most obvious effect of which will probably be a rash of automobile and paternity litigation.⁷⁹ There is not even absolute immunity from suit for acts committed in the course of their official duty, for the German courts are bound to give to that fact only "such legal weight and effect as it is entitled to under German law."⁸⁰ Under a military occupation, such acts would, it goes without saying, be entirely exempt from the jurisdiction of the local courts.⁸¹

The right to requisition, a major incident of occupation, has been abolished and replaced by the Federal Republic's commitment to ensure that the forces' requirements will be met⁸²—a commitment which is limited to the fulfillment of the defensive mission of the forces and which in other respects is closely circumscribed. Goods, materials and services do not, under present conditions, present a serious problem, except perhaps in the case of the French forces. Sales to the British and American forces for sterling or dollars constitute, in effect, substantial export items and as such are not likely to cause pain to the Federal Republic. To the extent, however, that there may be competition between the forces and the civilian economy for items in short supply, the matter would be regulated by a Joint Supply Board, with Allied and German representation, which is responsible for formulating procurement programs.⁸³

Such a squeeze actually does exist in the matter of "accommodations," meaning housing and real estate; not only is housing still inadequate, but the requirements of the forces for maneuver areas place a severe strain on Western Germany's limited supply of farmland. The Three Powers would, as noted above, keep what they have; but additional "accommodations" would be pretty much in the discretion of the Germans, for the requirements which the Federal Republic is obligated to fill are those "agreed" by the forces and the Federal Government.⁸⁴ Unlike the case of goods and services, there is no provision for a Joint Board, and the Three Powers would seem to have no recourse from German refusal to agree save an appeal to the Arbitration Tribunal, based on a contention that the refusal was arbitrary and unreasonable—a contention which the Tribunal, whose members are to be eminent lawyers rather than soldiers,⁸⁵ might find it a puzzle to adjudicate.

The forces have retained the right to contract directly with German suppliers of goods and materials,⁸⁶ but labor is to be obtained through the German authorities, who set the terms and conditions of employment, including wages.⁸⁷ Moreover, no duties even remotely para-military may be assigned to German employees.⁸⁸

Many other provisions of lesser importance, *e.g.*, the subjection of the

⁷⁹ Art. 17(7) requires that members of the forces obey the requirements of German law as to liability insurance on their private vehicles, although they may insure with any company, German or otherwise, which can pay Deutschmark claims.

⁸⁰ Art. 16(3).

⁸¹ *Dow v. Johnson* (1879), 100 U. S. 158.

⁸² Art. 37. The question of payment for such requirements is left to the Finance Convention.

⁸³ Art. 39.

⁸⁴ Art. 38(2).

⁸⁵ Charter, Art. 1.

⁸⁶ Art. 39(5).

⁸⁷ Art. 44(1), (5), (7).

⁸⁸ Art. 44(2), Art. 45.

forces to German excise taxes on certain commodities purchased by them from German producers,⁸⁹ might be adduced in support of the proposition that the privileges of the forces will be drastically deflated under the Forces Convention, but the point has been labored sufficiently. No doubt the Federal Republic will now press for the application of the whole NATO Status of Forces Agreement to the forces of the Three Powers stationed in its territory. But from the standpoint of the Three Powers, there is not much water to be squeezed out of the present convention. Domestic political considerations would make it exceedingly difficult for any of them, and especially for France, to concede, for example, the exercise of any form of German criminal jurisdiction over members of their forces. The United States, prior to the NATO Agreement, had traditionally asserted exclusive criminal jurisdiction over its armed forces, even when visiting the territory of a friendly Power,⁹⁰ and the Congressional uproar which greeted even that agreement's partial cession of criminal jurisdiction over a comparatively small number of American troops might well deter repetition of the experiment on a larger scale. And the Three Powers may argue, with considerable justification, that the NATO Agreement was never designed to meet the problems presented by the stationing of forces in the territory of another Power in such numbers, or in positions so near the forces of a potential aggressor, as is the case in Western Germany.

* * * * *

It would be profitless to pose, and very hard to answer, the question as to what the legal status of Western Germany will be under the Contractual Agreements. Vis-à-vis the Soviet Union, surely, the Three Powers must still claim the status of occupants of Germany, as the Soviet Union (despite its purported grant of sovereignty to the German Democratic Republic) claims it vis-à-vis them. It will be noted that the conventions "terminate the Occupation regime"⁹¹ but do not announce the end of the occupation itself, and, as already pointed out, the Three Powers explicitly state that they *retain*—not acquire under the conventions—those rights of an occupant which are essential in their relations with the Soviet Union and its East German satellite. They cannot thus be said to have voluntarily terminated their occupation. On the other hand, they would bind themselves, as solemnly and firmly as is possible to sovereign states, to exercise no other rights of occupation, save in stated extraordinary circumstances. The result, if taxonomy were essential in the circumstances, might be described as an occupation limited by contract. It seems to be without precedent in international law. Nor is this surprising, for the Contractual Agreements represent an effort to tailor a relationship among nations to a set of circumstances without precedent in history. In international law, as in other fields of law, this is how precedents are made.

⁸⁹ Art. 33(1)(a). The U. S. forces, at least, are unlikely to purchase within Germany tobacco, coffee, tea or sugar, but coal and alcohol, and possibly gasoline, might be procured from German sources.

⁹⁰ See King, "Jurisdiction over Friendly Foreign Forces," this JOURNAL, Vol. 36 (1942), p. 539.

⁹¹ Convention on Relations, Art. 1(1).

THE FINAL ACT OF THE LONDON CONFERENCE ON GERMANY

A STUDY IN THE LAW OF INTERNATIONAL ENGAGEMENTS

BY HERBERT W. BRIGGS

Of the Board of Editors

As Chairman of the Washington Conference on the Limitation of Armament, Secretary of State Charles Evans Hughes had occasion to observe that "certain of the resolutions . . . adopted by the Conference are put in treaty form. . . . In other cases, the resolutions are of a character not requiring such sanction in the form of a treaty, and are deemed to be binding upon the Powers according to their tenor when adopted by the Conference."¹ Problems of a comparable nature arise with reference to the obligatory force and juridical effect in international law of "decisions," "agreements" and "arrangements" set forth in the Final Act of the London Conference of 1954 on Germany.²

The London Final Act contains unilateral declarations purporting to establish definite legal obligations of which other states officially "take note"; the Act likewise sets forth a joint "declaration of intent," joint declarations, "agreed arrangements," agreements "to recommend," unilateral "assurances" and individual "statements." The Final Act states specifically that

All the decisions of the Conference formed part of one general settlement which is, directly or indirectly, of concern to all the NATO powers and which will therefore be submitted to the North Atlantic Council for information or decision.³

The decisions of the Conference are also referred to in the Final Act as "these agreements and arrangements."⁴

The political importance of the decisions reached at London may be briefly indicated by stating that the purposes of the Conference were to

¹ Sixth plenary session, Feb. 4, 1922. See Conference on the Limitation of Armament, Washington, November 12, 1921—February 6, 1922 (Washington, G. P. O., 1922), p. 286. See also Francis O. Wilcox, *The Ratification of International Conventions* (London, 1935), pp. 263-267.

² See London and Paris Agreements, September-October 1954 (Department of State Pub. 5659, International Organization and Conference Series II (European and British Commonwealth), 5), pp. 9-29, including annexes; also published as Agreement on Restoration of German Sovereignty and German Association with Western Defense System: Final Act of the Nine-Power Conference held at London, September 28-October 3, in Department of State Bulletin, Vol. 31, No. 798 (Oct. 11, 1954), pp. 515-530. The nine states participating in the London Conference were: Belgium, Canada, France, German Federal Republic, Italy, Luxembourg, Netherlands, United Kingdom and United States.

³ London and Paris Agreements, 1954, *op. cit.*, p. 9.

⁴ *Ibid.*, p. 18.

find a substitute for the European Defense Community proposal which the French had rejected, to provide for the restoration of German "sovereignty," the termination of the Allied occupation of Germany, the rearmament of Germany, and her inclusion within the framework of the North Atlantic Treaty and Brussels Treaty defense arrangements while safeguarding the national interests of all states concerned. The problems with which this paper is concerned are of a technical legal nature, falling within an area usually referred to as "the law of treaties." Since instruments like the London Final Act—possibly setting forth a variety of international engagements which depart from traditional treaty forms—have seldom been subjected to extended analysis, the writer has been emboldened to undertake the experiment.

THE NATURE OF A FINAL ACT

The conclusion of an international conference with the adoption of a Final Act enumerating or reproducing the texts of draft treaties, or of resolutions or decisions agreed upon at the conference is not novel. Examination of a large number of Final Acts drawn up since the Congress of Vienna reveals that they fall into clearly distinguishable patterns. The "*Acte du Congrès de Vienne du 9 Juin 1815*"—sometimes referred to as the General Treaty or Final Act of Vienna—was a formal treaty, signed and sealed, and subject to ratification.⁵ Article 117 provides that the regulations for the navigation of certain international rivers, annexed to the *Acte*, "shall have the same force and validity as if they had been textually inserted." Article 118 enumerates seventeen treaties, conventions, declarations, regulations and other acts, the texts of which are annexed to the *Acte*, and provides that they "are considered integral parts of the arrangements of the Congress and shall everywhere have the same force and validity as if they had been inserted word for word in the General Treaty."⁶ Each of the annexes was, however, signed separately and the annexed treaties and conventions were individually subject to ratification.⁷ The General Act⁸ of the Berlin Conference on the Congo, signed at Berlin, February 26, 1885, and the Brussels General Act of July 2, 1890, on the African Slave Trade⁹ were also formal treaties. Since all the agreements of each of these conferences were embodied in their respective General Acts, it was unnecessary to add statements that they formed an integral part of the treaties.¹⁰

This type of Final Act which is indistinguishable from a formal treaty has become increasingly rare. The Final Act of the Second Hague Peace

⁵ British and Foreign State Papers, 1814-1815 (cited as B.&F.S.P.), Vol. 2, pp. 3 ff.

⁶ *Ibid.*, p. 54.

⁷ *Ibid.*, pp. 56 ff.

⁸ Sir Ernest Satow, *A Guide to Diplomatic Practice* (1917), Vol. II, p. 213, states that "it was, in fact, spoken of as the *Acte Final*, until in the course of the ninth protocol, of February 23, its designation was changed." For text of the General Act of Berlin, see 76 B.&F.S.P. 4 ff.

⁹ 82 B.&F.S.P. 55 ff.

¹⁰ Satow, *op. cit.*, p. 214.

Conference,¹¹ signed and sealed at The Hague, October 18, 1907, is a formal instrument but is not a treaty in the sense of creating rights and obligations under international law for the signatories. It lists the states participating in the conference and their representatives and enumerates thirteen conventions and a declaration as having been drawn up at the conference and attached to the Final Act. It then states that "these Conventions and Declaration shall form so many separate Acts," which were separately subject to signature and ratification. The Final Act also contains some innocuous declarations, resolutions, recommendations and *vœux*, which create no legal rights or obligations, and has as an annex a draft Convention for a Court of Arbitral Justice. It is understandable that such a Final Act was not subject to ratification: it is not a treaty, but a *procès-verbal*.¹² This Final Act and the Final Act of the 1930 Hague Conference for the Codification of International Law have been regarded as models of the type of Final Act which is a *procès-verbal*.¹³

Of some forty Final Acts drawn up during the twentieth century which have been examined by the writer, all have been of the *procès-verbal* type.¹⁴ All were signed by representatives of the participating states, although occasionally an instrument was signed *ad referendum* or "subject to ratification" as the Soviet representative to the International Health Conference, held at New York in 1946, signed the Final Act of that conference.¹⁵ None of them appear to create any substantive rights or obligations under international law for the signatories, although, as Hudson observes, the Final Act may serve in part as "a formal record of the agreement of participating states to reservations made" to instruments drawn up at the conference.¹⁶

¹¹ See English translations of the original French text in Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences*, Translation of the Official Texts: The Conference of 1907, Vol. I (1920), pp. 679-696; W. M. Malloy, *Treaties, etc.*, Vol. II (1910), pp. 2369-2385.

¹² Cf. Manley O. Hudson, *International Legislation*, Vol. I (1931), p. xl, note 3: "... It is uncommon to provide for ratification of a Final Act."

¹³ For the text of the Final Act of the Hague Codification Conference, see League of Nations Doc. 1930. V. 7; this JOURNAL, Supp., Vol. 24 (1930), pp. 169-191.

¹⁴ The curious Final Act of the Sixth International Conference of American States held at Habana in 1928 is no exception. Although it set forth the texts of 11 conventions which provided that they should be signed, only the Spanish version of the Final Act was signed, no signatures being affixed to the conventions themselves. Those conventions which entered into force came into force at varying times through the deposit of ratifications, not through the signing of the Final Act. See Hudson, *International Legislation*, Vol. IV (1932), pp. 2279-2420; Hackworth, *Digest of International Law*, Vol. V (1943), p. 44; Harvard Research in International Law, *Draft Convention on the Law of Treaties*, this JOURNAL, Supp., Vol. 29 (1935), pp. 734-735. Some of the Final Acts of the Pan American Conferences go to ridiculous lengths in reproducing the full texts of as many as one hundred resolutions, the mere enumeration of which in the Final Act would suffice, since they possess no obligatory force.

¹⁵ See U.N. Doc. E/155, Final Acts of the International Health Conference held in New York from 19 June to 22 July 1946, pp. 1, 5.

¹⁶ Hudson, *op. cit.*, Vol. I, p. xl. See also on the nature of a Final Act, Paul Fauchille, *Traité de Droit International Public*, Vol. I, Pt. 3 (1926), pp. 245-248; Raoul Genet,

However, a signed Final Act, although primarily only a *procès-verbal*, may, as the Harvard Research in International Law observes, "contain, in addition, stipulations creating obligations for the parties which would give it the force and effect of a treaty."¹⁷ It is noteworthy that some of the politically most important conferences of recent years have terminated with the issuance of an agreed and signed *communiqué* or protocol which, in addition to performing the function of a *procès-verbal*, appears to establish or set forth rights and obligations under international law. Thus, although none of them is styled a "Final Act," the signed *Communiqués*, Declarations, and Reports of the Moscow Conferences of Foreign Ministers of October, 1943,¹⁸ and December, 1945,¹⁹ and the signed Protocols of Proceedings of the Yalta²⁰ and Potsdam²¹ Conferences of the Heads of Governments are more akin, both in form and in content, to the Final Act of the 1954 London Conference on Germany than are most of the Final Acts referred to above.

In form, the Final Act of London appears to be more like a *procès-verbal* than a treaty, but, as published by the Department of State, its departures from traditional forms suggested the *communiqué*, since it appeared to be neither attested, dated nor signed.²² The writer, upon

Traité de Diplomatie et de Droit Diplomatique, Vol. III (1932), pp. 251-261, 477-485. Satow, *op. cit.*, and Jules Basdevant, "*La Conclusion et la Rédaction des Traités et des Instruments Diplomatiques autres que les Traités*," Hague Academy of International Law, *Recueil des Cours*, Vol. 15 (1926), pp. 615 ff., 628 ff., deal sparingly with the subject. The literature on the subject is generally unrewarding.

¹⁷ Harvard Research, *loc. cit.*, p. 720.

¹⁸ Department of State Bulletin, Vol. 9, No. 228 (Nov. 6, 1943), pp. 307-311; A Decade of American Foreign Policy: Basic Documents, 1941-1949, Senate Doc. 123, 81st Cong., 1st Sess. (G.P.O., 1950), pp. 9-14.

¹⁹ Department of State Conference Series 79 (1946), Moscow Meeting of Foreign Ministers, December 16-26, 1945, pp. 9-18; A Decade of American Foreign Policy (cited above), pp. 58-66. It is noteworthy that the "*Communiqué*" and "Report" of this conference were subsequently printed under the rubric "Moscow Agreement, 1945" in the Department of State Treaties and Other International Acts Series as No. 1555.

²⁰ A Decade of American Foreign Policy, pp. 27-34, "The Crimean (Yalta) Conference, February 4-11, 1945, Protocol of Proceedings," etc. The Leaders' Agreement regarding Japan, signed at Yalta, Feb. 11, 1945, has also been published by the Department of State as Executive Agreement Series, No. 498.

²¹ A Decade of American Foreign Policy, pp. 34-50: "The Berlin (Potsdam) Conference, July 17-August 2, 1945, Protocol of the Proceedings, August 1, 1945" (with annexes and a proclamation).

Perhaps—to complete the record—reference should also be made to the signed joint Declarations emanating from the Tehran Conference of 1943 (A Decade of American Foreign Policy, pp. 23-25) and possibly to the unsigned *communiqué* of June 21, 1949, on the Sixth Meeting of the Council of Foreign Ministers, Paris, May 23 to June 20, 1949 (*ibid.*, pp. 110-112). With reference to the First, Second, Third, Fourth and Fifth Meetings of the Council of Foreign Ministers, no conference documents appear to have been issued (*cf. ibid.*, pp. 51-58, 72-110, for reports on these conferences by American participants).

²² The text of the Final Act of London as published in the New York Times, Oct. 4, 1954, The Times (London), Oct. 4, 1954, and *Le Monde* (Paris), Oct. 5, 1954, likewise fails to indicate that the instrument was signed or subject to signature.

inquiry, has been informed by the Department of State that the Final Act was signed by representatives of the states participating in the London Conference, the English version of the text providing, immediately preceding the Annexes:

In witness whereof the Representatives have signed this Final Act. Done in London this Third Day of October, 1954, in a single copy, in English, French and German, all three texts being equally authoritative. The original text will be deposited with the Government of the United Kingdom of Great Britain and Northern Ireland, which shall transmit certified copies thereof to each Government represented at the Conference.

Referring now to its content, while some of the decisions enumerated are of a preliminary nature obviously requiring implementation, other decisions, agreements and arrangements are set forth textually in such a form as to suggest that they may be intended to have "the force and effect of a treaty." The problem of determining their juridical effect thus becomes analogous to one of treaty interpretation, and recourse may properly be had to the intent of the parties and their subsequent conduct at the Paris Conference of October 20-23, 1954, insofar as it throws light upon the terms employed by them in the London Final Act.

THE DECLARATION OF INTENT

After enumerating the participating states and their representatives and setting forth their agreement that "all the decisions of the Conference formed part of one general settlement. . .," the London Final Act, in Part I dealing with "Germany," commences:

The Governments of France, the United Kingdom and the United States declare that their policy is to end the Occupation régime in the Federal Republic as soon as possible, to revoke the Occupation Statute and to abolish the Allied High Commission. The Three Governments will continue to discharge certain responsibilities in Germany arising out of the international situation.

That these sentences are not regarded as embodying any contractual agreement with Germany appears from what follows:

It is intended to conclude, and to bring into force as soon as the necessary parliamentary procedures have been completed, the appropriate instruments for these purposes. General agreement has already been reached on the content of these instruments and representatives of the Four Governments will meet in the very near future to complete the final texts.

However, "the Three Governments have in the meantime issued" a "Declaration of Intent" stating, in part: "*Recognising* that a great country can no longer be deprived of the rights properly belonging to a free and democratic people. . . . The Governments of France, the United Kingdom, the United States of America desire to end the Occupation régime as soon as possible"; and, pending the completion of appropriate parliamentary procedures:

In the meantime, the Three Governments are instructing their High Commissioners to act forthwith in accordance with the spirit of the above policy. In particular, the High Commissioners will not use the powers which are to be relinquished unless in agreement with the Federal Government, except in the fields of disarmament and demilitarisation and in cases where the Federal Government has not been able for legal reasons to take the action or assume the obligations contemplated in the agreed arrangement.²³

What is the juridical nature of these provisions? The joint declaration that it is the policy of the governments of France, the United Kingdom and the United States to end the Occupation régime and their statement that "it is intended to conclude . . . the appropriate instruments" appear to create no juridical obligations either as between the Three Governments or as between them and Germany. Even though a joint declaration of policy and intention, it appears nevertheless to fall short of an agreement to agree on any particular arrangement or instrument. The joint "Declaration of Intent," however, in providing, subject to the stated exceptions, that the High Commissioners of the Three Occupying Governments "will not use the powers which are to be relinquished unless in agreement with the Federal Government" of Germany, might appear to establish a benefit for Germany, if not a veritable legal right.²⁴ It is true that the Federal Republic of Germany is not a party to this "Declaration of Intent," although the Final Act in which it is recorded was signed on her behalf. It is of interest to note that, upon his return from London, Secretary of State John Foster Dulles made a statement on October 4, 1954, that "beginning today the Allied High Commissioners will forego the exercise of most of their occupation rights."²⁵ The employment in the Declaration of the words "will not use" and by Mr. Dulles of the words "will forego" might suggest that the Three Governments regarded themselves as establishing in the Declaration a benefit on behalf of Germany without thereby abandoning their legal rights or incurring a legal obligation towards Germany not to use certain powers.

²³ London and Paris Agreements, 1954, p. 10.

²⁴ See the observations of the Permanent Court of International Justice in its Judgment of June 7, 1932, in the *Free Zones Case* between France and Switzerland: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such." P.C.I.J., Ser. A/B, No. 46 (1932), pp. 147-148. Cf. Harvard Research Draft Convention on The Law of Treaties, "Art. 18 (b). If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation so long as the stipulation remains in force between the parties to the treaty." This JOURNAL, Supp., Vol. 29 (1935), p. 924, with comment, pp. 924-937. See further citations in Herbert W. Briggs, *The Law of Nations* (2nd ed., 1952), pp. 871-872.

²⁵ Department of State Bulletin, Vol. 31, No. 798 (Oct. 11, 1954), p. 519.

The subsequent action of the United States, the United Kingdom, France and the Federal Republic of Germany in drawing up at Paris on October 23, 1954, a Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, with five attached Schedules,²⁶ throws no further light upon the legal nature of the Declaration of Intent of London. Schedule I of this Paris Protocol contains provisions amending the Convention on Relations between the Three Powers and the Federal Republic of Germany, signed at Bonn, May 26, 1952, which will lead to the termination of the Occupation regime in the Federal Republic of Germany and the restoration of "the full authority of a sovereign State over its internal and external affairs."²⁷ These provisions will enter into force upon the deposit of ratifications of the Paris Protocol,²⁸ and no reference is made in the Protocol or annexed documents to the promise made in the Declaration of Intent of London not to use certain powers in the interim.

AGREED ARRANGEMENTS RELATING TO THE BRUSSELS TREATY

Part II of the London Final Act states that "The Brussels Treaty²⁹ will be strengthened and extended to make it a more effective focus of European integration," and "For this purpose the following arrangements have been agreed upon":

(a) The German Federal Republic and Italy will be invited to accede to the Treaty, suitably modified to emphasise the objective of European unity, and they have declared themselves ready to do so. . . .

(b) . . . the Consultative Council provided in the Treaty will become a Council with powers of decision.

(c) The activities of the Brussels Treaty Organisation will be extended to include further important tasks as follows:

The size and general characteristics of the German defence contribution will conform to the contribution fixed for EDC.

The maximum defence contribution to NATO of all members of the Brussels Treaty Organisation will be determined by a special agreement fixing levels which can only be increased by unanimous consent.

The strength and armaments of the internal defence forces and the police on the Continent of the countries members of the Brussels Treaty Organisation will be fixed by agreements within that Organisation. . . .³⁰

Are these provisions a mere enumeration of agreements reached at London or are they the actual terms of "a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves" (the Harvard Research description of a treaty³¹)? If these provisions purport to set forth the

²⁶ London and Paris Agreements, 1954, pp. 63-121.

²⁷ *Ibid.*, p. 65.

²⁸ *Ibid.*, pp. 63-64.

²⁹ *Ibid.*, pp. 57-62, for the text of the Brussels Treaty between Great Britain, Belgium, France, Luxembourg and The Netherlands, signed March 17, 1948; also in this JOURNAL, Supp., Vol. 43 (1949), p. 59.

³⁰ London and Paris Agreements, pp. 10-11.

³¹ *Loc. cit.*, p. 686, Art. 1 (a).

actual terms of agreement, the London Final Act leaves significant questions unanswered. For example, did the Brussels Treaty Powers assume by the London Final Act obligations of a legal nature towards each other or towards Germany and Italy in agreeing that the latter "will be invited to accede" to a modified Brussels Treaty? Did Germany and Italy assume legal obligations under paragraph (a), above, to accede to the treaty by declaring themselves ready to accede? If so, were these obligations assumed only towards the Brussels Treaty Powers or also towards the United States? Was the United States a party, through the signature of her representative, Mr. Dulles, to an agreement that "the Brussels Treaty will be strengthened and extended"? To take another example: Did Germany, in paragraph (c), above, accept as a legal obligation under international law the principle that "the size and general characteristics of the German defence contribution will conform to the contribution fixed for EDC"? If so, is she obligated in this respect to the United States?

The informality which characterizes the drafting of this part of the London Final Act suggests that the provisions quoted above are a mere enumeration of the agreements reached at London rather than the texts of such agreements. Yet documents emanating from the Paris Conference of October, 1954, may suggest the contrary. Protocol No. I Modifying and Completing the Brussels Treaty, signed at Paris, October 23, 1954, refers to the decisions of the London Conference "as set out" in the London Final Act;³² and the joint Declaration of the Brussels Treaty Powers deciding to invite the German Federal Republic and Italy to accede refers to a Brussels Treaty "modified in accordance with the decisions of the Conference held in London . . . which are recorded in its Final Act."³³

A partial answer to the dilemma can be found in the statement made in Part VI of the London Final Act that "The Conference agreed that representatives of the governments concerned should work out urgently the texts of detailed agreements to give effect to the principles laid down above." In Paris each of the "arrangements" relative to the Brussels Treaty which was "agreed upon" at London is implemented by a Declaration or by draft Protocols which are subject to ratification prior to their coming into force.³⁴ Yet the conclusion that the London decisions on the Brussels Treaty required elaboration in detailed agreements leaves open the question whether agreement in London upon such principles as the size of German armed forces and the level of the military and police forces of other Brussels Treaty Powers possessed no legal effect. The writer would venture the opinion that the setting forth of these principles in the

³² London and Paris Agreements, 1954, p. 38.

³³ *Ibid.*, p. 37. This Declaration of the Brussels Treaty Powers records their decision to invite Italy and the Federal Republic of Germany to accede to a modified Brussels Treaty. The Declaration is neither signed nor dated and contains no indication of where it was drawn up or why (since the decision had already been made and recorded in the London Final Act), unless this is the text of the actual invitation.

³⁴ *Ibid.*, pp. 18, 37-56.

form of "agreed arrangements" in a Final Act signed by the parties involves the assumption, according to their tenor, of legal obligations by them despite the preliminary and somewhat imprecise formulation of the obligations. It is not lightly to be assumed that states would regard themselves as retaining complete freedom of action after having formally recorded their agreement to seek the implementation of certain formulated principles.

THE GERMAN UNDERTAKING ON ATOMIC WEAPONS

By paragraph 15 of Part II of the London Final Act,³⁵ "The Brussels Treaty Powers have taken note of the following Declaration of the Chancellor of the Federal Republic of Germany and record their agreement with it":

THE FEDERAL CHANCELLOR DECLARES:

that the Federal Republic undertakes not to manufacture in its territory any atomic weapons, chemical weapons or biological weapons, as detailed in . . . the attached lists;

.

that the Federal Republic agrees to supervision by the competent authority of the Brussels Treaty Organisation to ensure that these undertakings are observed.³⁶

What is the juridical effect of these significant statements? The Chancellor of the Federal Republic of Germany, representing that state at the London Conference, made a unilateral declaration by which "the Federal Republic undertakes" not to manufacture, for example, any atomic weapons in its territory, and by which "the Federal Republic agrees to supervision" of this undertaking by a proposed "competent authority." Does the statement that the Brussels Treaty Powers "have taken note of" the Declaration of the Chancellor and "record their agreement with it" establish a contractual relationship between Germany and the Brussels Treaty Powers? That is, have they concluded an agreement with the German Federal Republic by stating that they are in agreement with such a Declaration made by the Chancellor of that state? Although the Declaration and the statement of the Brussels Treaty Powers recording their agreement with it appear in a section of the London Final Act, which commences with the statement that "the Brussels Treaty will be strengthened and extended," and although the undertakings were further implemented at Paris in October, 1954, it appears possible to conclude that the Federal Republic of Germany assumed contractual obligations indicated in the Declaration as of the date of the London Final Act.

The implementation at Paris of this international agreement was somewhat complicated. The Declaration made at London by Chancellor Adenauer was attached verbatim as Annex I of Protocol No. III³⁷ on the Control of Armaments, signed at Paris, October 23, 1954, by representa-

³⁵ *Ibid.*, p. 12.

³⁶ *Ibid.*, p. 13.

³⁷ *Ibid.*, pp. 45-50, including annexes.

... of Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, The Netherlands and the United Kingdom. By Article 1 of this Protocol,

The High Contracting Parties, members of Western European Union take note of and record their agreement with the Declaration of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook not to manufacture in its territory atomic, biological and chemical weapons. . . .

Article 4 states that weapons of these and certain other types "will be controlled to the extent and in the manner laid down in Protocol No. IV." Protocol No. IV³⁸ on the Agency of Western European Union for the Control of Armaments was signed at Paris the same day by the representatives of the same states and provides for supervision, inspection and control, and possible penalties decided upon by majority vote.³⁹

Protocols Nos. III and IV are stated to be integral parts of Protocol No. I⁴⁰ Modifying and Completing the Brussels Treaty, signed at Paris by representatives of the same states on October 23, 1954, and enter into force when all instruments of ratification of Protocol No. I "have been deposited with the Belgian Government and the instrument of accession of the Federal Republic of Germany to the North Atlantic Treaty has been deposited with the Government of the United States of America."⁴¹ Until the Paris Protocols are ratified and Germany accedes to the North Atlantic Treaty, they, of course, impose no obligations on Germany. However, they may be regarded as reiterating and implementing contractual obligations already undertaken by the Federal Republic of Germany at London, by means of the unilateral Declaration of her Chancellor, the recorded agreement with it by the Brussels Treaty Powers, and the signing of the London Final Act recording the transaction by the parties to the agreement.

THE BRITISH COMMITMENT TO KEEP FORCES ON THE CONTINENT

Part III of the Final Act of the London Conference is headed "United States, United Kingdom and Canadian Assurances."⁴² It sets forth a conditional "statement" by Secretary of State Dulles to the effect that in certain circumstances he

would certainly be disposed to recommend to the President that he should renew the assurance offered last spring in connection with the European Defense Community Treaty to the effect that the United States will continue to maintain in Europe, including Germany, such units of its armed forces as may be necessary and appropriate to contribute its fair share of the forces needed for the joint defense of the North Atlantic area while a threat to the area exists. . . .

³⁸ *Ibid.*, pp. 51-56.

³⁹ *Ibid.*, Art. 20.

⁴⁰ *Ibid.*, pp. 37-42, Art. I.

⁴¹ *Ibid.*, p. 40, Art. VI.

⁴² *Ibid.*, pp. 14-15, and in more extended form in Annex to the London Final Act, pp. 20-27. Some of the reasons, based upon constitutional law, adduced by Mr. Dulles to explain the inability of the United States to go beyond his statement may prove to be debatable. *Ibid.*, p. 21.

This statement obviously creates no legal obligation on the part of the United States: while indicating (in the words of the Final Act) "the willingness of the United States to continue its support for European unity" in accordance with the statement of Mr. Dulles, it falls short of establishing a contractual relationship under international law. The same may be said of the Canadian "statement" by which the Canadian Minister for External Affairs, Lester Pearson, reaffirmed the Canadian Government's resolve to continue to discharge her existing obligations arising out of membership in NATO, and welcomed the proposed extension of the Brussels Treaty.

On the other hand, the United Kingdom, through Foreign Secretary Anthony Eden, gave an "assurance" in terms which suggest the assumption by the United Kingdom of important legal obligations:

. . . The United Kingdom will continue to maintain on the mainland of Europe, including Germany, the effective strength of the United Kingdom forces which are now assigned to SACEUR—four divisions and the tactical Air Force—or whatever SACEUR regards as equivalent fighting capacity.

The United Kingdom undertakes not to withdraw those forces against the wishes of the majority of the Brussels Treaty Powers, who should take their decision in the knowledge of SACEUR's views. This undertaking would be subject to the understanding that an acute overseas emergency might oblige Her Majesty's Government to omit this procedure. If maintenance of the United Kingdom forces on the mainland of Europe throws at any time too heavy a strain on the external finances of the United Kingdom, then we would invite the North Atlantic Council to review the financial conditions on which the formations are maintained.

It is true that in making this statement at the Fourth Plenary Meeting of the London Conference on September 29, 1954, Mr. Eden referred to it as a "proposal." He added:

. . . You all know that ours is above all an island story. . . . And it has been not without considerable reflection that the Government which I represent here has decided that this statement could be made to you this afternoon. . . . Of course, you will understand that what we have just said, and the undertaking we are prepared to give, does depend on the outcome of our work. If we succeed here, then this undertaking stands; if we do not, H. M. Government could not regard itself as committed to what I have said this afternoon. That applies to the whole of our work, all the work that we are doing here. . . .⁴³

It is possible to interpret the United Kingdom statement as a proposal involving no legal commitment by the United Kingdom unless and until the envisaged substitute for EDC is set up and in operation. It is also possible to regard the British Government as having assumed by unilateral undertaking legal obligations to maintain certain armed forces on the Continent and not to withdraw them (with one possible exception) without the consent of other states. The words "will continue to maintain" and "undertakes not to withdraw those forces against the wishes of the ma-

⁴³ *Ibid.*, p. 25.

jority of the Brussels Treaty Powers" and Mr. Eden's statement "If we succeed here [*sc.* at London (?)], then this undertaking stands" may be regarded as importing a legal obligation. Although the term "proposal" was employed in presenting the statement, the same statement was referred to as an "assurance" in the Final Act, which recorded "the decisions of the Conference" and a "general settlement," and thus appears to have met Mr. Eden's condition of the success of the London Conference.⁴⁴

If the latter view can be maintained, what was the formal juridical nature of the British undertaking? If the undertaking imported a contractual obligation, who were the parties to the contract? Since, according to the terms of the undertaking, it is the Brussels Treaty Powers who have the right to oppose the withdrawal of British armed forces and consequently the capacity to determine the legality of a particular British withdrawal, they are undoubtedly parties to the arrangement. They are not merely beneficiaries of a British promise, but would appear to have acquired legal rights corresponding to the legal obligations assumed by the British in the undertaking.

Such a conclusion would rest upon evidence of an offer and acceptance to which international law assigned legal force. The requisite evidence could theoretically be found in the nature or form of the undertaking and the statements or conduct of representatives of the parties making the alleged offer and acceptance. There is nothing "alleged" about the offer: it is specific and, as Mr. Anthony Eden stated, deliberately authorized by the British Government. Evidence of acceptance of this British undertaking can be implied from the fact, stated above, that the British "proposal" was incorporated as an "assurance" in the Final Act by which the nine states represented at London agreed that "all decisions of the Conference formed part of one general settlement" and stated that "these agreements and arrangements constitute a notable contribution to world peace." This conclusion is supported by extrinsic evidence. It is common knowledge that French reluctance to ratify the European Defense Community arrangements was inspired in part by the failure of those arrangements to include a British pledge of closer military support. It is equally clear that it was only the British willingness to accept the under-

⁴⁴ Note, however, the warning made in a British Foreign Office statement of Dec. 24, 1954, when the French National Assembly voted against the rearmament of Germany: "The United Kingdom commitment, offered at the London conference, to maintain British forces on the Continent of Europe depends on the ratification of the Paris agreements by all the parties." *New York Times*, Dec. 25, 1954, pp. 1-2. With this may be compared the statement of Secretary of State Dulles on Oct. 4, 1954, upon his return from the London Conference and prior to the Paris Conference: "The United Kingdom has made a momentous long-term commitment of its military forces to the continent of Europe." *Department of State Bulletin*, Vol. 31, No. 798 (Oct. 11, 1954), p. 519. On the basis of evidence more ambiguous than that upon which the British commitment rests, the Permanent Court of International Justice held binding a statement of the Norwegian Minister for Foreign Affairs, in its Judgment of April 5, 1933, on *The Legal Status of Eastern Greenland*. P.C.I.J., Ser. A/B, No. 53 (1933), pp. 22, 71.

taking stipulated in the Final Act of the London Conference which made the success of the London Conference possible.

The evidence presented above would seem to suggest that the British undertaking, although perhaps most sought after by France, was not limited to France, or, perhaps, even to the Brussels Treaty Powers, but involved a legal commitment by the British Government to all of the other states signing the London Final Act. The legal obligation may be regarded as in force as of the date of the Final Act, although in certain circumstances, *e.g.*, the failure of the Continental states to implement the London decisions and agreements constituting the general settlement, the British Government might conceivably regard its undertaking as having ceased to be legally obligatory because of such failure. Such a commitment, although of a conditional nature, could still properly be regarded as a legal commitment, binding until the envisaged conditions materialized (or failed to materialize).

Once again, the Paris agreements fail to clear up all the questions arising out of the London agreements. Protocol No. II on Forces of Western European Union, signed at Paris October 23, 1954, by representatives of Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, The Netherlands and the United Kingdom, repeats in Article 6 substantially, but not verbatim, the British undertaking made at London, in the following terms:

Article 6

Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland will continue to maintain on the mainland of Europe, including Germany, the effective strength of the United Kingdom forces which are now assigned to the Supreme Allied Commander Europe, that is to say four divisions and the Second Tactical Air Force, or such other forces as the Supreme Allied Commander Europe regards as having equivalent fighting capacity. She undertakes not to withdraw these forces against the wishes of the majority of the High Contracting Parties who should take their decision in the knowledge of the views of the Supreme Allied Commander Europe. This undertaking shall not, however, bind her in the event of an acute overseas emergency. If the maintenance of the United Kingdom forces on the mainland of Europe throws at any time too great a strain on the external finances of the United Kingdom, she will, through Her Government in the United Kingdom of Great Britain and Northern Ireland, invite the North Atlantic Council to review the financial conditions on which the United Kingdom formations are maintained.⁴⁵

This Protocol, like Protocols Nos. III and IV, does not become legally binding until Protocol No. I is brought into force.⁴⁶ The legal position with reference to the British commitment might be stated as follows: Until Paris Protocol No. II enters into force, the British Government is legally bound by Mr. Anthony Eden's undertaking as expressed and recorded in the

⁴⁵ London and Paris Agreements, 1954, p. 44.

⁴⁶ See above, p. 157.

London Final Act; if the Paris Protocols never enter into force, the British Government might re-examine the commitment made at London on the plausible ground that the London commitment was of a provisional nature and that the general settlement envisaged at London had failed to materialize.

On October 22, 1954, the North Atlantic Council adopted a "Resolution on Results of the Four and Nine Power Meetings" which reads, in part, as follows:

THE NORTH ATLANTIC COUNCIL:

Recognising that all the arrangements arising out of the London Conference form part of one general settlement which is directly or indirectly of concern to all the NATO Powers and has therefore been submitted to the Council for information or decision;

.

Take Note with satisfaction of the statements made on 29th September 1954 in London by the United States Secretary of State and the Canadian Secretary of State for External Affairs, and of the declaration by the Foreign Secretary of the United Kingdom concerning the maintenance of United Kingdom forces on the continent of Europe;

.

Record their deep satisfaction at the happy conclusion of all the above arrangements. . . .⁴⁷

AGREEMENTS TO RECOMMEND

In Part IV (labeled "NATO") of the London Final Act, it is stated, in part:

The powers present at the Conference which are members of NATO agreed to recommend at the next ministerial meeting of the North Atlantic Council that the Federal Republic of Germany should forthwith be invited to become a member.

They further agreed to recommend to NATO that its machinery be reinforced in the following respects:

(a) All forces of NATO countries stationed on the Continent of Europe shall be placed under the authority of SACEUR, with the exception of those which NATO has recognised or will recognise as suitable to remain under national command.⁴⁸

While it is obvious that these statements do not of themselves invite Germany to join NATO or establish legal limitations on national control of Continental armed forces, they record the agreement of eight of the nine London Powers to submit certain matters for decision by the North Atlantic Council and likewise record their agreement as to the content of the joint recommendations to be made to the Council. What is the juridical force and effect of such agreements when they are formally recorded in a signed Final Act? Where international agreements are set

⁴⁷ London and Paris Agreements, 1954, pp. 35-36.

⁴⁸ *Ibid.*, p. 15. Half a dozen other "agreements to recommend," set forth in Part IV, are here omitted.

forth in such an instrument, the preliminary or relatively minor character of the obligations assumed is juridically irrelevant: the important legal consideration is the fact that international law assigns legal force and effect to an instrument recording agreements between authorized representatives of states and attested by them through signature. The reciprocal rights and obligations inherent in the expression of such agreements are thus legally binding according to their tenor.

RELATED DECLARATIONS, UNILATERAL AND JOINT

Another agreement of great significance remains to be noted. Part V of the Final Act of London, entitled "Declaration by the German Federal Government and Joint Declaration by the Governments of France, United Kingdom and United States of America" reads in part as follows:

The following declarations were recorded at the Conference by the German Federal Chancellor and by the Foreign Ministers of France, United Kingdom and United States of America.

Declaration by German Federal Republic

The German Federal Republic has agreed to conduct its policy in accordance with the principles of the Charter of the United Nations and accepts the obligations set forth in Article 2 of the Charter.

Upon her accession to the North Atlantic Treaty and the Brussels Treaty, the German Federal Republic declares that she will refrain from any action inconsistent with the strictly defensive character of the two treaties. In particular the German Federal Republic undertakes never to have recourse to force to achieve the reunification of Germany or the modification of the present boundaries of the German Federal Republic, and to resolve by peaceful means any disputes which may arise between the Federal Republic and other States.

Declaration by the Governments of United States of America, United Kingdom and France

The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic,

Being resolved to devote their efforts to the strengthening of peace in accordance with the Charter of the United Nations and in particular with the obligations set forth in Article 2 of the Charter.

[Here follow provisions from Art. 2, pars. 3-6, of the Charter]

Take note that the German Federal Republic has by a Declaration dated October 3rd [1954] accepted the obligations set forth in Article 2 of the Charter of the United Nations and has undertaken never to have recourse to force to achieve the reunification of Germany or the modification of the present boundaries of the German Federal Republic, and to resolve by peaceful means any disputes which may arise between the Federal Republic and other States:

DECLARE THAT

1. They consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and

therefore entitled to speak for Germany as the representative of the German people in international affairs.

2. In their relations with the Federal Republic they will follow the principles set out in Article 2 of the United Nations Charter.

.

7. They will invite the association of other member States of the North Atlantic Treaty Organisation with this Declaration.⁴⁹

The complementary nature and related form of these declarations recorded in the signed Final Act of London clearly suggest an intention to establish thereby contractual obligations under international law. The parties to the agreement so concluded are the German Federal Republic, on the one hand, and, initially, the United States, the United Kingdom and France, on the other. By the terms of the agreement, the German Federal Republic, although not a Member of the United Nations, "has agreed" with the United States, the United Kingdom and France to conduct its policy towards all states in accordance with the principles of the United Nations Charter, and "accepts the obligations" set forth in Article 2 of the Charter, *inter alia*, to settle its international disputes by peaceful means, to refrain from the threat or use of force, to assist the United Nations in action it takes in accordance with the Charter, etc.

At Paris, paragraph 7 of the American-British-French Declaration made at London was implemented as indicated by the following:

*Resolution of Association with the Tripartite Declaration
of October 3, 1954*⁵⁰

THE NORTH ATLANTIC COUNCIL,

Welcoming the declaration made in London by the Government of the Federal Republic of Germany on 3rd October, 1954, and the related declaration made on the same occasion by the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic,

Notes With Satisfaction that the representatives of the other Parties to the North Atlantic Treaty have, on behalf of their Governments, today⁵¹ associated themselves with the aforesaid declaration of the Three Powers.

Confirmation of the contractual nature of the obligations assumed by the German Federal Republic at London is also indicated in the preamble to the Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany, signed at Paris, October 23, 1954, by representatives of Belgium, Canada, Denmark, France, Greece, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Turkey, the United Kingdom and the United States.⁵² The preamble states, in part, that:

⁴⁹ *Ibid.*, pp. 16-18. Secretary of State Dulles later referred to these related declarations as "an exchange of declarations." Department of State Bulletin, Vol. 31, No. 806 (Dec. 6, 1954), p. 853.

⁵⁰ London and Paris Agreements, 1954, p. 36.

⁵¹ No date is indicated.

⁵² London and Paris Agreements, 1954, pp. 30-31.

The Parties to the North Atlantic Treaty . . .

.

Having noted that the Federal Republic of Germany has by a declaration dated 3rd October, 1954, accepted the obligations set forth in Article 2 of the Charter of the United Nations and has undertaken upon its accession to the North Atlantic Treaty to refrain from any action inconsistent with the strictly defensive character of that Treaty, and

Having further noted that all member governments have associated themselves with the declaration also made on 3rd October, 1954, by the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic in connection with the aforesaid declaration of the Federal Republic of Germany,

agree (by Article 1) to invite the Federal Republic to accede to the North Atlantic Treaty "upon the entry into force of the present Protocol."

It would thus appear that contractual obligations have been assumed by the German Federal Republic towards fourteen states to conduct her foreign policy towards all states—whether or not Members of the North Atlantic Treaty Organization or of the United Nations—in accordance with the principles and obligations set forth in Article 2 of the United Nations Charter. In return, the NATO Powers—two of which (Italy and Portugal) are not Members of the United Nations—have declared that in their relations with the Federal Republic of Germany—likewise not a Member of the United Nations—they will follow the principles set out in Article 2 of the Charter.⁵³

* * *

In conclusion, it may be stated that whatever legal force and effect particular provisions of the London Final Act may possess depends upon the fact that the London Final Act is, generically, a treaty—a formal instrument of agreement attested and signed on behalf of the parties thereto by which they establish relations under international law between themselves. The problems arising as to the legal significance of particular declarations, arrangements, agreements and decisions recorded therein stem in part from the uneven drafting of the instrument, some provisions being more formally drafted and precise than others, and in part from the fact that the Final Act contains no indication as to when it or the agreements recorded in it shall enter into force. As to the Final Act itself, the problem is easily resolved: not being subject to ratification, it entered into force as an instrument of international law on the date of signature.

The foregoing analysis has led the writer to the conclusion that the related declarations by which Germany undertook to conduct its policy in accordance with the principles of the United Nations Charter and certain

⁵³ Comparable obligations with reference to Art. 2 of the Charter were assumed by Japan—likewise not a Member of the United Nations—and other states, by Art. 5 of the Treaty of Peace with Japan, signed at San Francisco, Sept. 8, 1951. T.I.A.S., No. 2490. They were immediately made operative in relation to the Korean situation by an exchange of notes of the same date. *Ibid.*, pp. 171-173; this JOURNAL, Supp., Vol. 46 (1952), pp. 73, 88-90.

SEDENTARY FISHERIES AND THE AUSTRALIAN CONTINENTAL SHELF *

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The Australian proclamations of September 10, 1953,¹ claiming the continental shelf adjacent to the coasts of the Commonwealth and its Territories are interesting in several respects. They depart as to form from the British practice, and so suggest that the United Kingdom drafts have been found by the advisers to the Australian Government to be inadequate; they attempt for the first time to establish a specific relationship between the shelf and sedentary fisheries; and they raise the novel and yet important question of the competence of an Administrator to extend the boundaries of a Trust Territory. The proclamations were issued only after careful consideration of previous claims and the academic controversies they have generated, and one may conclude from the text that, since the International Law Commission reported on the subject, the concept of the continental shelf and the character of the rights asserted in respect of it have crystallized, and that a definite pattern has now been set for future development of the law.

I. BACKGROUND TO THE CLAIM

The Australian pearling industry in the Timor and Arafura seas has a continuous history from the middle of the last century. As early as 1851 operations were regularly being conducted from bases in the principal bays of the northwest coast of Australia, and these were extended during the next decade to the waters of Torres Strait. Since 1877 the headquarters of the Queensland pearl fishing industry has been located on Thursday Island. Neither Western Australia nor Queensland, however, was constitutionally competent to institute an effective system of fishery control in the areas subject to pearling activities. Throughout the nineteenth century it was accepted that no colonial legislature could legislate extraterritorially, and this principle was interpreted by the Law Officers of the Crown, in a number of opinions from 1854 onward, as limiting the operation of colonial fishery legislation to territorial waters, or outside them to persons domiciled in the colony.² While

* In this article British Year Book of International Law is cited as B. Y.; United Nations documents are cited by number only.

¹ Commonwealth of Australia Gazette, 1953, No. 56, p. 2563; printed in this JOURNAL, Supp., Vol. 48 (1954), p. 102.

² In 1854 the Queen's Advocate advised that foreigners would not be affected by halibut and sealing regulations outside the territorial waters of the Falkland Islands. See G. L. G. Coates, Responsible Government in the Dominions (2nd ed., 1912), Vol. I, p. 372. Hereafter several opinions were delivered (e.g., 1855, Forsyth, Cairns and Opinion of

Western Australia in 1886 instituted a licensing system with respect to pearl fishing, and imposed an export duty on pearl shell, the Law Officers in three opinions, the principal of which is dated August 10, 1888, advised that the legislation could not be enforced against persons fishing exclusively outside the three-mile limit.³ Pursuant to this advice Western Australia instructed its fishery protection officers to restrict the system to vessels pearling within territorial waters.⁴

The incompetence of Western Australia was somewhat mitigated by the power delegated by the Imperial Parliament in 1885 to the Federal Council of Australasia to legislate for "fisheries in Australasian waters beyond territorial limits."⁵ There remained doubts whether constitutionally this power would extend over foreign nationals outside the three-mile limit, and as the only immediate objective of a system of control was the supervision of deep-sea divers from Singapore and other British colonies, it was considered wise to restrict the legislation of the Federal Council to "British ships and boats attached to British ships."⁶ This restriction was accordingly incorporated in the two pieces of legislation of the Council extending the licensing system in 1888 to the waters around Queensland,⁷ and in 1889 to those around Western Australia.⁸

The Acts of the Federal Council were preserved by the Commonwealth Constitution,⁹ and were only repealed by the Commonwealth Pearl Fisheries Act of 1952.¹⁰ Accordingly, during this period of sixty years, conservation and licensing legislation of Queensland¹¹ and Western

Constitutional Law, p. 217) in which there is some ambiguity concerning the overlap of international and constitutional law; *e.g.*, in the opinions relating to the Newfoundland fishing legislation given in 1863, 1866, 1888, 1889, and 1890, Law Officers' Opinions, C. O., Vol. I, No. 154; Vol. II, No. 400, Vol. IV, Nos. 134, 163, 164, 166, 168A, and 177. For the limitations on Newfoundland legislation, see *Rhodes v. Fairweather* (1888), and *Queen v. Delepine* in *Newfoundland Decisions* (1897), pp. 321 and 378.

³ Law Officers' Opinions, C. O., Vol. IV, Nos. 73 and 127.

⁴ Papers of the Legislative Council of Western Australia, 1888, 2nd Sess., No. 26.

⁵ 48 & 49 Vict., c. 60, s. 15(c).

⁶ Law Officers' Opinions, C. O., Vol. IV, No. 152. See the discussion of the relationship of the power to the British Merchant Shipping legislation by Goldie in 1 *Sydney Law Review* (1953) 87.

⁷ The Queensland Pearl Shell and Bêche-de-mer Fisheries (Extra-Territorial) Act, No. 1 of 1888, s. 2.

⁸ The Western Australian Pearl Shell and Bêche-de-mer Fisheries (Extra-Territorial) Act, No. 1 of 1889, s. 19. See the discussion of the constitutional limitations in Federal Council Debates, 1889, p. 47, and in Parl. Pap. 1885, C. 4481. Similarly the Commonwealth Whaling Act applies only to ships registered in Australia, No. 62 of 1935.

⁹ 63 & 64 Vict., c. 12, clause 7. Sec. 51 (x) was virtually a repetition of the fishery power of the Federal Council. See Official Records of the National Australian Conventions Debates, Adelaide, 1897, pp. 776-778; Sydney, 1897, 2nd Sess., pp. 1073-1074; Melbourne, 1898, pp. 1855-1874, particularly p. 1857.

¹⁰ No. 8 of 1952.

¹¹ Pearl Shell and Bêche-de-mer Fishery Acts 1881-1931, 45 Vict., No. 2; 50 Vict., No. 2; 55 Vict., No. 29; 57 Vict., No. 7; 60 Vict., No. 32; 63 Vict., No. 3; 4 Geo. V, No. 12; 12 Geo. V, No. 10. Riesenfeld draws the conclusion that this legislation has operated over a wide area of high seas. Protection of Coastal Fisheries under Inter-

Australia¹² operated in respect of both British and foreign vessels within territorial waters, and the system instituted by the Federal Council operated outside in respect of British vessels only. There is some evidence of control by the Australian Navy of the pearling activities of Dutch fishermen outside territorial limits, and there is at least one instance in 1911 where three Dutch pearling schooners were arrested on the high seas.¹³ No prosecutions seem to have been taken, however, and there was no occasion to revise the constitutional limitations that had originally prevented the colonies from asserting control over the pearl beds. Nor, indeed, was there any effective pressure on the Commonwealth Government until the mid-1930's to assert any exclusive rights. That pressure resulted from the activities in the years before the second World War of Japanese pearl-ers who took one and a half times as much pearl shell in one year as the amount estimated to be a maximum seasonal harvest, and whose activities in consequence occasioned serious anxiety for the future of the Australian pearling industry.¹⁴

The war afforded an opportunity for the oyster beds to rehabilitate themselves, and it was contemplated at the San Francisco Peace Conference that, pursuant to Article 9 of the Treaty of Peace with Japan, the Japanese Government would enter into contractual arrangements with the Australian Government to enable conservation measures to be taken. In 1952 the Commonwealth enacted two pieces of legislation authorizing the implementation by the executive of any agreed measures with respect to both high seas¹⁵ and sedentary fisheries¹⁶ in waters to be proclaimed "Australian waters." However, while negotiations between the Australian and Japanese governments were still in progress, Japanese pearl-ers resumed their prewar activities in the Arafura Sea, and during the 1953 season are reported to have taken 1,100 tons of

national Law (1942), p. 170. This is based upon the widely accepted misconception that the maritime boundary of Queensland is the line drawn to define the islands forming part of the State. This line goes to the coast of Papua. The misconception appears in the memorandum submitted to the State Department by the United States Consul General in London in 1923 and reproduced in Hackworth, *Digest of International Law*, Vol. II (1941), p. 678; also in Cumbræ-Stewart's article in 12 *Journal of Comparative Legislation and International Law* (1930) 299; in Goldie, *loc. cit.*, p. 95, note; in Jessup, *The Law of Territorial Waters* (1927), p. 16; in Mouton, *The Continental Shelf* (1952), p. 140; and in the Reports of the Great Barrier Reef Committee, 1928, Vol. II, p. 97. The Law Officers, however, reported in 1863 and 1875 that the limits of Queensland did not extend over the sea, *Law Officers' Opinions*, C. O., Vol. I, Nos 185, 190, Vol. III, No. 53; the Queensland courts have never admitted such a jurisdiction, *Chapman v. Rose*, [1914] Q.S.R. 302; *D. v. Commissioner of Taxes*, [1941] Q.S.R. 218; and before the International Court in the *Anglo-Norwegian Fisheries Case* the United Kingdom, with the consent of the Commonwealth Government, denied the claim. Pleadings, Oral Arguments, Documents, Vol. II, p. 522. The Queensland legislation was, therefore, insufficient to found an exclusive right to the pearl beds.

¹² Pearling Act, 1912-24, 15 Geo. V, with amendments of 1928, 19 Geo. V, No. 7; 1929, 20 Geo. V, No. 11; 1931, 22 Geo. V, No. 14; 1932, 23 Geo. V, No. 17; 1935, 26 Geo. V, No. 20.

¹³ Goldie, *loc. cit.*, p. 89.

¹⁴ H. of Rep. (Hansard), 1953, No. 1, p. 121.

¹⁵ Fisheries Act, No. 7 of 1952.

¹⁶ Pearl Fisheries Act, No. 8 of 1952.

pearl shell, while the Australian harvest was only 170 tons. This suggested that the Japanese were, as a matter of policy, asserting an interest in the pearling grounds adverse to any exclusive claim that Australia might make during the negotiations. These were accordingly broken off in September, 1953, and the Commonwealth resolved upon unilateral action.

Australia might have contented itself with asserting a proprietary interest in specific pearl beds themselves, and relied on the evidence of a century of continuous exploitation by Australians. Two inter-related factors appear to have militated against the assertion of a narrow claim of this character. The first was the indisputable fact that the pearl beds have been worked, without formal protest, by Malay and Indonesian native divers from time immemorial,¹⁷ and by Japanese at least since 1935, and that the Australian legislation, although probably for constitutional reasons only, had expressly excluded foreign nationals from its operation. The second was a serious doubt concerning the true basis of such an interest. It is universally admitted that certain states do exercise sovereignty over pearl and sponge fisheries,¹⁸ but various explanations of the origin of their rights are current. The British Government has defined the rights of Ceylon as based on "immemorial user," "uninterrupted and undisputed proprietorship," and "long usage."¹⁹ Australia has likewise, without making any specific claims, considered as exceptional to the regime of the high seas "sedentary fisheries for pearl oysters and beches-de-mer, etc., on certain portions of the sea bottom outside the three-mile limit, which, by long usage, have come to be regarded as the subject of occupation and property."²⁰

Does this imply, as some writers maintain, that prescription is recognized by the United Kingdom and Australia to be the basis of appropriation of the sea bed?²¹ Prescription, as traditionally conceived, would

¹⁷ Serventy in Fisheries Newsletter, 9, No. 3 (1950), pp. 18-20; and in 6 The Australian Geographer (1952) 13.

¹⁸ Tunis sponge fisheries: Smith, Great Britain and the Law of Nations, Vol. II (1935), p. 121; Granville Bay Fisheries: Gidel, Le Droit International Public de la Mer, Vol. I (1932), p. 489; Ceylon: Vattel, *Droit des gens*, Vol. I, Ch. 23, sec. 287; Pearl Fisheries Ordinance, 1925, Riesenfeld, *op. cit.*, p. 169; Sardinian coral beds: Fulton, The Sovereignty of the Sea (1911), p. 697; Irish Sea Oyster Fisheries: 31 & 32 Vict., c. 45, s. 67, although there is no evidence that it was enforced against foreign nationals, Report from the Select Committee on Oyster Fisheries (1876), Vol. 8, p. 166; British Counter-Case in the Behring Sea Arbitration, Parl. Pap., U. S., No. 4 of 1893 (C. 6921).

¹⁹ Parl. Deb., H. C. 5 s., Vol. 164, cols. 1261-1262; Vol. 163, cols. 1417-1418; Publications of the League of Nations, 1929, V. 2, C. 74. M. 39. 1929. V, p. 162. See the opinion of Travers Twiss in Smith, *op. cit.*, p. 122, where he founded the claims of the Bey of Tunis on a "prescriptive enjoyment of the *fructus*," and Hurst in 4 B. Y. (1923-1924) 40.

²⁰ Reply to the Questionnaire of the Preparatory Committee for the Codification of International Law, Publications of the League of Nations, 1929, V. 2, C. 74. M. 39. 1929. V, p. 166. See also François, A/CN. 4/42, pp. 55-57.

²¹ In this context it is usual to cite the Madras case of Annakumar Pillai v. Muthupayal, [1904] 27 Ind. L.R. 551; A/CN. 4/60, p. 89. It seems, however, that

om to have no place in the regime of the sea. It is difficult to perceive how there can be prescriptive rights to either a *res nullius* or a *res communis*.²² In either case, against whom can an adverse interest arise?²³ The motive underlying any effort to assimilate the sea bed to the sea itself as a *res communis* is precisely to put it beyond appropriation, and thereby beyond the possibility of being subjected to an interest adverse to the community of nations.²⁴ Acquisitive prescription is no the equivalent of the doctrine of historic rights, and it has been an appreciation of this fact that has prompted the suggestion that such right as now exist over the sea bed are survivals either of Islamic law or of larger jurisdictions over the sea itself which have long since contracted.²⁵ As it happens, both these explanations of an historic interest are dubious: the first because there is no place in international law for a doctrine of intertemporal law,²⁶ the second because it has yet to be established that the larger jurisdiction did in fact exist.²⁷ The doctrine of historic rights, in short, can only be resorted to in order to explain a specific appropriation of the sea bed where a special regime has been established by positive practice of nations as a derogation from general principle.²⁸ Such, perhaps, is the regime of pearl fishing in the Persian Gulf, where the littoral states are conceded to have certain common interests, prob-

that decision could be based on the conclusion that Palk's Strait is inland waters rather than on the special status of the pearl beds themselves.

²² Mouton, *op. cit.*, p. 268; Johnson in 27 B.Y. (1950) 332 *et seq.*; Beckett in *Revue des Cours de l'Académie de Droit International*, Vol. 50 (1934), p. 218 *et seq.* Their disagreement neither as to the running of time nor as to the facts necessary to constitute the running: Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), p. 178; Fauchille, *Traité de Droit International Public* (8th ed.), Vol. I, Pt. 2 (1925), p. 762; Venezuela Arbitration, British and Foreign State Papers, 1896-1897, Vol. 89, p. 57.

²³ It is true that in English law a title to the foreshore may arise by prescription, but the authorities clearly view this as an interest adverse to the Crown as a corporation sole. *Benest v. Pipon* (1829), 1 Knapp 60; *Dickens & Kemp v. Shaw* (1823),

L. J. (O.S.) K.B. 122; *Foster v. Urban District Council of Warblington*, [1906] K.B. 648.

²⁴ Gaius, II, I; *Inst.* II, I, 1; Plantus, *Bud.* 4.3.36; Cicero, *pro Rosc.* 26. But see the opinion of Judge Alvarez in the Anglo-Norwegian Fisheries Case, I.C.J. Reports, 1951, 15, and the views of Johnson, *loc. cit.*, p. 350.

²⁵ I must, *loc. cit.*, p. 40, quoting Hall, *International Law* (8th ed., Higgins), p. 189. He, however, speaks only of the sea and not the sea bed; Higgins and Colombos, *The International Law of the Sea* (2nd ed., 1951), p. 282; Jessup, *op. cit.*, p. 15; Mouton, *op. cit.*, p. 144; Lindley, *op. cit.*, p. 69; Oppenheim in *Zeitschrift für Völkerrecht*, Vol. 4 (1908), p. 10, criticized by Westlake, *International Law*, Vol. I (1910), p. 203. Hall, *Foreign Powers and Jurisdiction* (1894), p. 243, note; Counter-Case of Her Majesty's Government in the Behring Sea Arbitration, Parl. Pap., U. S., No. 3, 1895, p. 93. Sweden adopted this view in its communication to the International Law Commission, A/2456, p. 66; also François, A/CN. 4/SR. 207, par. 9.

²⁶ The Island of Palmas Arbitration, this JOURNAL, Vol. 22 (1928), p. 867.

²⁷ There is nothing to support this generalized view of an abandonment of jurisdiction on the Boroughs, *Sovereignty of the British Seas* (1920), Potter, *Freedom of the Sea* (1921), History, Law and Politics (1924), or in Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926).

²⁸ Anglo-Norwegian Fisheries Case, I. C. J. Reports, 1951, pp. 130-131; this JOURNAL, Vol. 23 (1952), pp. 358-359.

ably to the exclusion of outside nations.²⁹ The tenor of the British statements, above cited, and in the *Behring Sea Arbitration* shortly to be discussed, does not favor the view that the Ceylon pearl fisheries are to be treated in this way as an exception and not as an instance. The conclusion must be that the sea bed is a *res nullius* susceptible of a single act of appropriation, and that "long usage" is advanced as an evidentiary formula fortifying the appropriation, and not as the criterion of itself. Prescription, and the antiquity of the interest, thus appear to be irrelevant to the discussion, and occupation is left as the most satisfactory explanation of existing claims to the sea bed.³⁰ What amounts to occupation is, however, by no means clear, since the effectiveness of an occupation of the sea bed is a highly relative matter. Perhaps it is sufficient for the claimant state to couple with a prior and continued exploitation some formal act excluding the nationals of other states. It would thus be difficult to effect an occupation where the nationals of several states have long been accustomed to fish, since priority of exploitation could not readily be established.

Whether based on historic interest or occupation, therefore, an Australian claim to *dominium* of any portion of the Arafura Sea or Torres Strait could perhaps be met by evidence that the Commonwealth, neither in fact nor in intention, had excluded foreign nationals from exploitation of the marine products of the area in question, whether at one precise moment or over a long period of time. No formal claim had ever been made by Australia, and no inchoate right had been formally acquiesced in by foreign states, although a supposed Australian claim had been recorded by the United States Department of State.³¹

II. THE PROCLAMATIONS

It was accordingly resolved, when negotiations with the Japanese Government were broken off, to assert some more generalized and fundamental right to the pearl beds than that afforded by long usage and actual exploitation, and to found an exclusive interest in the pearl oysters in virtue of the special status of the sea bed itself. This object was achieved by the device of anchoring a system of pearl fishery licensing by legislation to a claim to sovereignty over the continental shelf, of

²⁹ François, A/CN. 4/SR. 120, par. 22; A/CN. 4/42, p. 59.

³⁰ Westlake, *op. cit.*, pp. 190-191; Goldie, *loc. cit.*; Smith, *op. cit.*, p. 122; Anninos, *The Continental Shelf and Public International Law* (Thesis, Neuchâtel, 1953), p. 63. The Abu Dhabi Award, cited below, speaks of sedentary fisheries as having a "customary" basis. See Hurst, "*la condition juridique du sous-sol qui se trouve au-dessous du lit de la haute mer se rapproche du statut d'une res nullius en ce que le premier occupant s'assure un titre qui sera bon contre tout le monde. . . . On peut admettre la même chose pour la surface du lit de la haute mer,*" *Annuaire de l'Institut de Droit International* (1925), p. 160; Fulton, *op. cit.*, p. 697; Cockburn, C. J., in *Regina v. Keyn*, [1876] L. R. 2 Ex. Div. 63; British Counter-Case in the *Behring Sea Arbitration*, below.

³¹ Hackworth, *op. cit.*, p. 677.

which the pearl oysters are the product. An amendment was passed to the Pearl Fisheries Act, 1952, providing for regulations to be issued enforceable "on all pearlers and ships engaged in pearling in Australian waters irrespective of nationality."³² The proclamations of September 10, 1953, claiming the shelf were made practically simultaneously with the passage of the legislation. The area of "proclaimed waters" under the Act was defined in a schedule to the regulations made pursuant to the Act.³³ It overlaps the continental shelf in certain places, and on the Queensland and New Guinea coasts extends far beyond it, and even to the Equator. Hitherto, notices under the Act have applied only to certain portions of the shelf,³⁴ and it may be expected that, at least for the present, no effort will be made to enforce the Act beyond the shelf. For this reason it is sufficient to limit this discussion to an analysis of the claim to the shelf, and merely to note in passing that outside the shelf the Act may be adequate, if fortified by prior and continuous Australian pearling, to effect an occupation of the sea bed. It is also to be noted that the Fisheries Act, 1952,³⁵ operates over the same area, and is not restricted on its face to Australian nationals. There is yet no indication that it will be enforced against foreign nationals.³⁶

Two proclamations of sovereignty over the continental shelf were made, one with respect to the area contiguous to the Commonwealth, the other with respect to that contiguous to the Trust Territory of New Guinea. Both are in substantially the same terms, and the purpose of the second is to declare that sovereign rights over the continental shelf exist "in respect of the Trust Territory," whereas in the first it is declared that "Australia has those sovereign rights." Having recited that international law "recognizes that there appertain to a coastal state or territory sovereign rights over the sea-bed and the subsoil of the continental shelf contiguous to its coasts for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil," the first proclamation proceeds to declare:

³² No. 38 of 1953.

³³ No. 84 of Statutory Rules, 1953, schedule 3. A Proclamation proclaimed all Australian waters north of 27° south latitude, Commonwealth of Australia Gazette, 1953, p. 2684, pursuant to sec. 8 of the Pearl Fisheries Act, 1952. See also Proclamation No. 62, *ibid.*, p. 2785.

³⁴ Commonwealth of Australia Gazette, 1953, No. 63, pp. 2785-2786.

³⁵ No. 7 of 1952.

³⁶ The Minister for Fisheries apparently admitted that this legislation would not operate in international law to affect foreign nationals when he drew a distinction between sedentary and other fisheries. H. of Rep. (Hansard), 1953, No. 1, p. 18. At present the necessity for conserving high seas fisheries does not validate an exclusive claim by the coastal state. Spiropoulos, A/CN.4/SR. 69, p. 27; Fenwick, *International Law* (3rd ed., 1948), p. 423; Selak, this JOURNAL, Vol. 44 (1950), p. 670 *et seq.*; Allen, 21 Washington Law Review (1946) 1 *et seq.*, and this JOURNAL, Vol. 47 (1953), p. 479; Mouton, *op. cit.*, p. 72. The International Law Commission has accepted the proposition that pelagic fisheries and the shelf are unrelated. A/CN. 4/SR. 63, p. 16, SR. 69, p. 4; A/CN. 4/48; A/316, p. 22; A/CN. 4/L. 45, Add. 1, Ch. III; A/2456, p. 17.

that Australia has sovereign rights over the sea-bed and subsoil of:—

- (a) the continental shelf contiguous to any part of its coasts; and
 - (b) the continental shelf contiguous to any part of the coasts of territories under its authority other than territories administered under the trusteeship system of the United Nations,
- for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil. . . .

The second proclamation, having declared that sovereign rights exist over the sea bed and subsoil of the continental shelf contiguous to any parts of the coasts of the Territory of New Guinea, goes on to declare that "those rights are exercisable by the Government of Australia as the Administering Authority of the Territory of New Guinea." Both proclamations were expressed not to affect the "character as high seas of waters outside the limits of territorial waters," or "the status of the sea-bed and subsoil that lie beneath territorial waters."

On the 25th of September, 1953, further proclamations were made bringing into operation the Pearl Fisheries Act, 1952, and designating the boundary of the Australian portion of the shelf where it approaches the shores of Indonesia and Netherlands New Guinea.³⁷ This is of some interest, since commentators on the regime of the continental shelf have devoted considerable speculation to the problem of dividing up the shelf between several contiguous states. In the case of Australia the problem was not notably acute, and the difficulty of having islands of a foreign state on the shelf was avoided by defining the limits of Australian sovereignty as bounded by a line commencing on the rim of the shelf some 250 miles south of the Aru Islands, which are Indonesian, and proceeding across the shelf in an easterly direction to intersect with the line defining the outer limits of Queensland's island jurisdiction at a point representing an extension of the boundary line between Netherlands New Guinea and Australian New Guinea.³⁸

It will be noticed that the proclamations are unambiguous as to the nature of the right claimed. Having recited that international law recognizes that there "appertain to" a coastal state or territory sovereign rights over the continental shelf, they proceed to declare that Australia has "sovereign rights" over the sea bed and subsoil of the shelf contiguous to its coasts. There is thus an identification of the term "appertain" as used in the Truman proclamation³⁹ with the term "sovereignty" as used in the British, Latin American and Pakistan

³⁷ Commonwealth of Australia Gazette, 1953, No. 59, p. 2683.

³⁸ A line commencing at the most westerly point where the parallel 9°2' south latitude intersects the outer edge of the shelf; thence proceeding along that parallel to its intersection with meridian 135°38' east longitude; thence in a straight line to the intersection of the parallel 9°43' with the meridian 137°12' with the meridian 141°2'; thence along that meridian to the mouth of the Benue River.

³⁹ U. S. Proclamation No. 2667, 10 Fed. Reg. 12303; Exec. Order No. 9633, *ibid.*, p. 12305; this JOURNAL, Supp., Vol. 40 (1946), pp. 45, 47. See the Persian Gulf Proclamations in this JOURNAL, Supp., Vol. 43 (1949), pp. 156, 185.

proclamations.⁴⁰ This should make it clear that the controversy concerning the character of the right asserted by the United States is novel and that the issue for the future is whether or not international law permits an extension of sovereignty, as distinct from some lesser species of jurisdiction, over adjacent submarine areas.⁴¹ The proclamations are furthermore characterized by what both Young⁴² and Azaranga⁴³ have defined as a "studied lack of precision" as to limits. The term "studied" is applied legitimately, since it is recognized that the continental shelf is a variable quantity;⁴⁴ it possesses the potentiality of expansion with the advance in techniques of exploitation of the seabed. Australia is, therefore, not prepared to delimit the shelf by a definitive act which might proscribe such further extension as circumstances may justify, and is satisfied to achieve some temporary delimitation by municipal law. Accordingly, the amending legislation states that the term "continental shelf" is one of reference to the sea bed and subsoil of the submarine areas contiguous to Australia to a depth of 100 fathoms. This corresponds roughly with the formulation of the International Law Commission, which, after a review of the observations of certain governments and the considerations of the special *rapporteur*,⁴⁵ abandoned the criterion of exploitability adopted in 1951⁴⁶ in favor of that of a

⁴⁰ Bahamas (Alteration of Boundaries) Order in Council, Statutory Instrument 1948, No. 2574; British Honduras (Alteration of Boundaries) Order in Council, 1950, No. 1649; Falkland Islands (Continental Shelf) Order in Council, *ibid.*, 1950, No. 2100; Jamaica (Alteration of Boundaries) Order in Council, *ibid.*, 1948, No. 2575 (C.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. 1, Pt. 1, Continental Shelf).

⁴¹ Abu Dhabi Arbitration Award, 1 International and Comparative Law Quarterly (1952) 255; Lauterpacht, in 27 B.Y. (1950) 389; François and Briery in A/CN.4/SR.68, pp. 6-8; Hurst, in 34 Grotius Society Transactions (1949) 162; Young, in this JOURNAL, Vol. 42 (1948), p. 850; Waldoock, in 36 Grotius Society Transactions (1951) 137; Vallat, in 23 B.Y. (1946) 334; Memorandum on the Regime of the High Seas, A/CN.4/32, p. 81; A/CN.4/SR. 196, 197, 198.

⁴² *Loc. cit.*, p. 853.

⁴³ In 2 *Revista Española de Derecho Internacional*, I (1949) 64. See Kunz in *Revista de la Facultad de Derecho de Mexico* (1953) No. 10.

⁴⁴ Lauterpacht, *loc. cit.*, p. 383; Mouton, *op. cit.*, p. 22 *et seq.*

⁴⁵ A/CN.4/60. The most authoritative definition of the shelf so far given is the one of the International Committee on the Nomenclature of Ocean Bottom Features: "The zone around the continent, extending from the low water line to the depth at which there is a marked increase of slope to greater depth. Where this increase occurs the term shelf edge is appropriate. Conventionally its edge is taken at 100 fathoms (or 200 metres) but instances are known where the increase of slope occurs at more than 100 or less than 65 fathoms. When the zone below the low water line is highly irregular, and includes depths well in excess of those typical of continental shelves the term Continental Borderland is appropriate." Minutes of Meeting held at Monaco, Sept. 22, 1952, App. B—Agreed Definitions, published in *Union Géodésique Internationale*, Bull. d'Inf., Vol. 2, No. 3, July, 1953, p. 555.

⁴⁶ A/CN.4/SR. 68, p. 13; see A/CN.4/48, Annex, Art. 1 of Draft, p. 54. Note that it suggests that areas where exploitation is not possible are excluded. Cf. Azaranga, *loc. cit.*, on the theory of delimitation from the coast, and the criticisms of the exploitation test by Mouton, *op. cit.*, p. 43; Lauterpacht, in A/CN.4/SR. 196, 197.

depth of 200 meters.⁴⁷ The Minister for Fisheries on the second reading explained that Australia preferred the English measurement to the Continental.⁴⁸

III. THE BASIS OF THE CLAIM

It is this lack of precision in the various continental shelf claims that has provided a stumbling-block to the development of the law. The whole topic presents such an appearance of "ragged ends and unfilled blanks" as Lord Asquith put it,⁴⁹ that it invites rejection as something "tentative and exploratory." There are almost as many rationalizations of the concept of the continental shelf as there have been commentators, but basically the controversy is the old one between those who reason *a priori* and the positivists. To the latter it is axiomatic that unilateral acts cannot promote a rule of law in the absence of acquiescence.⁵⁰ Hence the profitless excursion into the question of absence of protest.⁵¹ It might be commented that protests have not been directed against the less exaggerated claims only because no state has had sufficient economic interest in the matter to challenge what might have been described as an intention to commit a wrong.⁵² Japan has broken the spell by protesting against the Australian proclamation in no uncertain terms, describing it as contrary to international law, and proposing reference to the International Court; to this recourse Australia has agreed. Absence of protest is, therefore, of only relative value in determining whether or not a rule of law has evolved. Indeed, if the consensual theory were pressed to its logical conclusion, it would be difficult to discover more than a few rules of international law. A dynamic system of law is not susceptible of evaluation exclusively in terms of precedent and acquiescence. A basic principle may be vague as to extent and application, but that is not to conclude, as Lord Asquith did,⁵³ that it lacks juridical character. International law is inchoate in the relations of states, in the pattern of behavior to which they adapt themselves, and the function of the lawyer is merely to recognize this fact and then elaborate by a process of juristic construction the necessary technical rules to make the principles operative.⁵⁴ Precedent is only a test of the pattern in question, and hence it may be unilateral without inhibiting the growth of law. When it is observed that over twenty nations have asserted the competence to extend sovereignty over their continental shelves, and when, further, it

⁴⁷ A/CN.4/L.45, p. 12; A/CN.4/SR.196.

⁴⁸ H. of Rep. (Hansard), 1953, No. 1, p. 18.

⁴⁹ Abu Dhabi Award, *loc. cit.*, p. 256.

⁵⁰ Only Mouton's elaborate argument need be cited, p. 260 *et seq.*, but the approach is fundamental in many comments on the topic.

⁵¹ Of course absence of protest is very relevant as a test of the value of unilateral acts, as Lauterpacht has shown, *loc. cit.* (note 41 above), p. 393 *et seq.*, but it is not necessary to found a rule of law.

⁵² Lotus Case (1927), P.C.I.J., Ser. A., No. 10, p. 29.

⁵³ Abu Dhabi Award, *loc. cit.*, p. 256.

⁵⁴ Rivier, *Principes du Droit des Gens* (1896), Vol. I, p. 36; Scelle, *Précis de Droit des Gens* (1934), Vol. II, p. 298.

is realized that these include the major Powers with a preponderant interest in both the freedom of the seas and the protection of coastal resources,⁵⁵ it is legitimate to assert, without further analysis of consensus, that the continental shelf is a concept of law. The fact that it has not yet been contained within precise limits nor formulated in unambiguous terms is a reflection on the deficiencies of analytical positivism rather than upon the reality of the concept.⁵⁶

It is significant that few lawyers have denied that the continental shelf is susceptible of *imperium*, and the controversy in consequence has revolved more around the mode than the possibility of acquisition. Prescription as a mode is inapplicable for the reasons earlier advanced, and also because in this context it would be equivalent to the doctrine of historic rights, whereas it was precisely to avoid the difficulties of proving an historic title that the Australian and other claims have been made. Occupation, on the other hand, seems to be an unnecessary ground of appropriation of the continental shelf. There is no need to resort to the doctrine of effectiveness of occupation either to permit of a distinction between the sea bed and the waters above it,⁵⁷ or to establish satisfactory checks upon extravagant pretensions.⁵⁸ The line between any paper claim to the sea bed and a manifestation of control must at times wear pretty thin, and the distinction between an inchoate right and effective occupation becomes even more artificial and illusory in relation to the continental shelf than it is in relation to Greenland or even to Antarctica.⁵⁹ If occupation is to mean anything at all when employed as the basis of claims to the continental shelf, it can only signify a formal claim to an area of the sea bed constituting a natural extension of the land mass, and susceptible at that moment of effective exploitation.

One is therefore forced, as the International Law Commission was,⁶⁰ to accept the position that the continental shelf doctrine is a generic one, independent of both prescription or historic right, and occupation. It is founded on the consideration that states do and will assert claims to the shelf, that the latter can be and is in varying degrees exploited, and that

⁵⁵ Lauterpacht, *loc. cit.*, pp. 376-377; Crichton v. Samos Navigation Co., Annual Digest of Public International Law Cases, 1925-26, Case No. 1.

⁵⁶ The International Law Commission has expressed its view that "it is not possible to base the principles of the sovereign rights of the coastal state exclusively on recent practice, for there is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the states concerned." It thus rejected the positivist approach in favor of an argument from general "principle and convenience," based on the fact that the shelf has become an object of active interest to states, and that "general utility" demands that the coastal state have priority of exploitation. A/CN.4/L.45/Add. 1, Ch. III; A/2456, par. 73.

⁵⁷ Cf. Waldock, *loc. cit.*, p. 141 *et seq.* The Argentine proclamation linked the shelf and the waters above it.

⁵⁸ Cf. Green in 4 Current Legal Problems (1951) 79; Mouton, *op. cit.*, p. 267.

⁵⁹ Lauterpacht, *loc. cit.*, p. 421.

⁶⁰ The International Law Commission took the view that the status of the shelf is independent of occupation. A/1316, p. 22; A/CN.4/L.45/Add. 1, Ch. III; A/2456, par. 72.

the law cannot stand still and fail to provide a satisfactory basis for a reconciliation of conflicting claims. In short, then, economic necessity is the generating impulse of the doctrine, and contiguity is relied on as the test of its validity. This is clear from the statement of the Australian Minister for Fisheries when moving the Pearl Fisheries Amendment Bill. "Pearl shell," he pointed out, "is attached to a specific area of the seabed. It grows in well-known areas which do not change their location. Accordingly, conservation measures, to be effective, must be applied to individual areas on much the same basis as conservation of natural resources on the land."⁶¹ He pointed out that as a result of uncontrolled Japanese activities before the war, the Australian pearling industry suffered economic difficulties necessitating government subsidy, and that the announced intentions of the Japanese would "severely prejudice the recovery" of the industry. Australia therefore grounds its claim to the pearl beds upon the hypothesis that the littoral state has the prior right of controlling and exploiting the resources naturally appertaining or, in other words, contiguous, to it.⁶² Contiguity as a doctrine of international law is said to have been rejected in the *Island of Palmas* arbitration,⁶³ but contiguity is a highly relative term. As applied to a readily inhabitable island, or to the watershed,⁶⁴ it has a certain content which perhaps renders it doctrinally inappropriate; as applied to Antarctica or to the sea bed, it has quite a different content and relies on different factors.⁶⁵ Certainly, after the *Eastern Greenland Case*,⁶⁶ occupation cannot be said to be any more precise a test of the validity of claims than physical identity and unity, or whatever other words may be used to describe the same natural phenomenon.⁶⁷

The only appropriate test of the continental shelf, therefore, is that of

⁶¹ H. of R. (Hansard), 1953, No. 1, p. 18.

⁶² See Lauterpacht on the theory of legitimate interests and requirements of the international community, *loc. cit.*, p. 376; Borchard, in this JOURNAL, Vol. 40 (1946), p. 53; Fauchille, *op. cit.*, p. 147; also the economic interests envisaged by the International Court in the Anglo-Norwegian Fisheries Case, I.C.J. Reports, 1951, p. 153, and the opinion of Judge Alvarez, at p. 157. The Commission has been careful to reserve the question of the nature and of the basis of the "sovereign rights attributed to the coastal State," pointing out that "the considerations relevant to this matter cannot be reduced to a single factor." A/CN.4/L.45, Add. 1, Ch. III; A/2456, par. 73.

⁶³ *Island of Palmas Arbitration*, *loc. cit.*; Waldoock, *loc. cit.*, p. 141; Mouton, *op. cit.*, p. 292.

⁶⁴ Hall, *International Law* (3rd ed., 1890), p. 109; Smith, *op. cit.*, p. 3; Westlake, *Collected Papers* (1914), p. 173.

⁶⁵ Lauterpacht, *loc. cit.*, pp. 426-427.

⁶⁶ *Legal Status of Eastern Greenland*, P.C.I.J., Ser. A/B, No. 53, esp. pp. 45-46; *Clipperton Island Arbitration*, Annual Digest of Public International Law Cases, 1931-2, Case No. 50. Necessity, qualified by contiguity, has been the genesis of exceptions to the regime of the high seas. See, e.g., the discussion of Lord Stowell in *Le Louis* (1817), 2 Dods. 210 at p. 245, and Marshall, C. J., in *Church v. Hubbard* (1804), 2 Cranch 187 at p. 234; *Croft v. Dunphy*, [1933] A.C. 156. See Jessup on the Anti-Smuggling Act, this JOURNAL, Vol. 31 (1937), p. 101; Anninos, *op. cit.*, p. 66.

⁶⁷ The Commission pointed out that it is not possible to disregard the facts of geography, whether they be described in terms of "propinquity, contiguity, geographical contiguity, appurtenance or identity of the submarine areas in question with the non-submerged contiguous land." A/CN.4/L.45, Add. 1, Ch. III; A/2456, par. 73.

ipso jure subjection to the littoral state. This was the test initially advanced by the International Law Commission,⁶⁸ and it remains implicit in its final draft.⁶⁹ It has been rejected by Lord Asquith, and by others who have devoted study to the subject, as not legally crystallized, and as dangerous in its vagueness.⁷⁰ But the *ipso jure* criterion is constructive because it affords a starting point for the evolution of specific rules to reconcile competing interests that, international lawyers notwithstanding, will arise.⁷¹ It is significant that, whereas the British proclamations, issued before the International Law Commission studied the question, were framed in an annexatory or constitutive manner,⁷² the Australian proclamations are in a declaratory form, asserting that sovereign rights over the continental shelf appertain to littoral states, and that "it is desirable to declare that Australia has those sovereign rights." In this appeal to innate rights one may perceive the logical deduction from the Commission's formula.

It must be noticed, however, that the Commission throughout its discussions was insistent that the existing rights of nationals of other states over the continental shelf should be respected by the littoral state. No discussion of rights arise was not discussed, and since the Commission was of opinion that the sovereignty of the littoral state is independent of a formal assertion, and the shelf itself in consequence being incapable of being characterized as *res nullius*, it can only be concluded that they are not constituted by occupation in the sense earlier suggested. To render the Commission's Report doctrinally consistent, therefore, it must be accepted that it intended the *ipso jure* attribution of sovereignty to relate back to time immemorial, in which case the rights of foreign nationals could arise by prescription, that is, by interests adverse to the littoral state. This thesis may have certain important repercussions in the constitutional law of federal states and it is relevant to an analysis of the juridical status of the shelf contiguous to Trust Territories. In addition it assists in a better understanding of the position of Indonesian pearl fishermen who have long operated on the Australian continental shelf, and perhaps enables a distinction to be drawn between their rights and those of the Japanese who have worked the shelf for only a short period of time.

IV. THE NATURE OF THE CLAIM: THE TRUST TERRITORY OF NEW GUINEA

It would seem that the *ipso jure* test alone justifies the Australian proclamation claiming "sovereign rights" over the shelf "in respect of"

⁶⁸ A/CN.4/SR. 68, p. 13.

⁶⁹ "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources." A/CN.4/L.45, Annex, Ch. III; A/2456, Art. 2. "The formulation thus adopted," says the Report, "takes into account the views of those members of the Commission who attached importance to maintaining the language of the original draft and those who considered that the expression 'rights of sovereignty' should be adopted." A/2456, par. 68.

⁷⁰ Mouton, *op. cit.*, p. 269; Waldock, *loc. cit.*, p. 142.

⁷¹ See Brierly in A/CN.4/SR. 68, p. 6.

⁷² See the comment by Anninos on the Qatar Arbitration, *op. cit.*, p. 37, note 1.

the Trust Territory of New Guinea. Here is a novel action which indicates that the old controversy concerning sovereignty in mandated and trust territories cannot be shelved.⁷³ If Australia has sovereignty over the New Guinea Territory, then she is competent to extend its boundaries; if sovereignty is vested in the United Nations, it is difficult to see how the extension could be justified on a basis alone of the Administering Power's act; if sovereignty is inchoate in the people of the Territory, the difficulties are less, though still considerable. The topic so bristles with jurisprudential complexities that no decisive opinion can be expressed until at least an examination has been made of the true nature of Australia's claim.

Is a claim to sovereignty over the shelf equivalent to a claim to property in it? Vattel, it is true, asserted that it was possible for either *dominium* or *imperium* to be present in a claim to the sea to the exclusion of the other.⁷⁴ In *Shively v. Bowlby*, on the other hand, it was in fact held that *dominium*, or ownership, and *imperium*, or regulatory power, are both attributes of property possessed by governments for political purposes.⁷⁵ The validity of the Australian claim in international law seems to depend upon the assimilation of pearl oysters to the status of the shelf, and this in turn depends upon the employment of certain concepts and categories of property law.⁷⁶ When, by design, a claim is tantamount to an exercise of the incidents of ownership, it seems highly artificial to erect a distinction between *imperium* and *dominium*, and, indeed, no such distinction is in fact erected either in theory or practice. The bulk of opinion favors the view, for example, that sovereignty over the territorial belt imports a proprietary title,⁷⁷ and this substantially because of an exclusive interest

⁷³ Q. Wright, *Mandates under the League of Nations* (1930), pp. 319, 449; Bentwich, *The Mandate System* (1930), p. 20; Brierly, in 11 B.Y. (1929) 217; Corbett, in 6 *ibid.* (1924) 135; Hall, in 24 *ibid.* (1947) 54; Van Maanen Helmer, *The Mandate System* (1929), p. 106; Evatt, in *Australia and New Zealand International Law Journal*, Vol. 1, p. 27.

⁷⁴ *Op. cit.*, Vol. I, Ch. 23, sec. 295. He nevertheless admits that property can exist in respect of fisheries. A comment in 56 *Yale Law Journal* (1947) 365 suggests that claims made to pearls, oysters, sponges and coral under theories of occupation, prescription or acquiescence of other nations, manifest regulatory power rather than property right. In *Att. Gen. for Canada v. Att. Gen. for Ontario*, [1898] A.C. 700 at p. 709, it was held that under international law *dominium* passes with *imperium* only by express cession. But see *Brief for the State of Texas in opposition to the Motion for Judgment, U. S. v. Texas* (1950), 339 U. S. 707, No. 13, Original, Oct. Term, 1949, p. 96 *et seq.*

⁷⁵ 152 U. S. 1 at p. 13 (1893). *Cf.* *Benest v. Pipon* (1829), 1 Knapp 60; *Johnson v. McIntosh* (1823), 8 Wheat. 543 at p. 595.

⁷⁶ Borchard, in this JOURNAL, Vol. 40 (1946), p. 59; *Brief in Support of Motion for Judgment, U. S. v. California* (1947), 332 U. S. 19, No. 12, Original, Oct. Term, 1946, pp. 58-59.

⁷⁷ Hale, *De Jure Maris*; Pufendorf, *De Jure Naturae et Gentium* (Classics of International Law (No. 17), Vol. II (1934)), p. 565; Bynkershoek, *De Dominio Maris*, Ch. II; Valin, *L'Ordonnance de la Marine* (1760), p. 640; Galiani, *Dei Doveri dei Principi Neutrali* (2nd ed., 1942), p. 321; Martens, *Précis du droit des gens* (Cobbett, 1802), p. 168; Azuni, *Droit Maritime de l'Europe*, Vol. I (Johnson, 1806), p. 224; Wheaton, *Elements of International Law* (1836), pp. 142-143; Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (1848), p. 232; Philli-

in the fisheries of the belt.⁷⁸ South Australia has legislated to designate as Crown lands the bed of the sea within the "territorial limits" of the State,⁷⁹ and assumes that the three-mile belt is within such limits.⁸⁰ The validity of this assumption depends upon the further assumption that in territorial waters sovereignty and property coalesce.⁸¹ It seems to be im-

more, Commentaries upon International Law, Vol. I (1854), p. 212, but compare his judgment in *Regina v. Keyn*, [1878] L. R. 2 Ex. Div. 63; Carnazza-Amari, *Traité de droit international public* (translated by Crocker, The Extent of the Marginal Sea (1919), p. 38); Field, *Outlines of International Law* (2nd ed., 1876), p. 21; Funct-Brentano & Sorel, *Précis du droit des gens* (1877), p. 375; Fiore, *Nouveau droit international public* (1885), sec. 805; Martens, *Traité de droit international* (Leo, 1883), Vol. I, p. 505; Pradier-Fodéré, *Traité de droit international* (1885), sec. 627; Maine, *International Law* (1888), p. 39; Imbart de Latour, *La mer territoriale* (1889), pp. 8, 19; Piédelièvre, *Précis de droit international public* (1894), Vol. I, p. 335; Hall, *A Treatise on International Law* (5th ed., 1904), pp. 152-153; Westlake, *op. cit.*, p. 18; Hurst, in 4 B.Y. (1923-24) 34, although the Acts he cites support only a limited occupation and not a general principle; Lindley, *op. cit.*, p. 63; Jessup, *op. cit.*, pp. 116-117; Bustamante y Sirven, *La mer territoriale* (1930), p. 158; Gidel, *op. cit.*, p. 33; François, in *Académie de droit international de La Haye, Recueil des Cours*, Vol. 66 (1938), p. 47; Brierly, *The Law of Nations* (3rd ed., 1942), p. 143; Scelle, *Droit International Public* (1944), p. 319; Hyde, *International Law* (2nd ed., 1945), Vol. I, pp. 461-468; Ross, *International Law* (1947), p. 139; Starke, *An Introduction to International Law* (1947), p. 120; Schwarzenberger, *International Law* (2nd ed., 1949), Vol. I, p. 149; Daniel, *Sovereignty and Ownership in the Marginal Sea* (1950); Hyde, in 3 *Baylor Law Review* (1951) 172.

⁷⁸ Rivier, *Principes du Droit des Gens* (1896), Vol. I, p. 148; Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938), p. 47; Leonard, *International Regulation of Fisheries* (1944), p. 11; Oppenheim-Lauterpacht, *International Law* (7th ed., 1948), Vol. I, p. 143; Azcárraga, *loc. cit.*, pp. 78-80.

The following do not subscribe to the *imperium-dominium* view: Ortolan, *Egles internationales et diplomatie de la mer* (2nd ed., 1853), Vol. I, p. 116 *et seq.*; Creasy, *First Platform of International Law* (1876), p. 234; Calvo, *Le droit international théorique et pratique* (5th ed., 1896), Vol. I, p. 479; Lapradelle in 5 *Revue de droit international public* (1898) 347; Fauchille, *op. cit.*, p. 132 *et seq.*

⁷⁹ Statutes, Vol. III, p. 115. The continental shelf proclamations, like the Truman Proclamation, expressly reserve the status of territorial waters, so that no "tidelands" dispute is raised by them directly. The legislation, however, is expressed to operate outside "territorial limits." The area of "proclaimed waters" extends from the high-water mark, so that it seems that the Commonwealth is asserting that the "territorial limits" of the States are the high-water mark.

⁸⁰ The title of the Australian States to the three-mile belt is in fact dependent upon the view that *Regina v. Keyn*, insofar as it held that the realm ends at the low-water mark, was wrongly grounded on the assumption that jurisdiction over territorial waters excludes a proprietary interest. [1876] L.R. 2 Ex. Div. 63; *Blackpool Pier Co. v. Fylde Union* (1877) 36 L.T. 251; *cf. Compagnie Française des Câbles Télégraphiques v. Administration Française des Douanes*, in 22 *Revue de droit international* (1933) 271; *Territorial Waters (Germany) Case* in *Annual Digest of Public International Law Cases*, 1919-22, Case No. 63.

⁸¹ *Secretary of State for India v. Chelikani Rama Rao*, [1916] L.R. Ind. App. 193; *Att. Gen. for Canada v. Att. Gen. for Ontario*, [1898] A.C. 700; *Re Quebec Fisheries* (1917), 35 D.L.R. 1; *Att. Gen. for Canada v. Att. Gen. for Quebec*, [1922] 1 A.C. 413; *Holyman v. Eyles*, [1947] Tas. S.R. 11; *Chapman v. Rose*, [1914] Q.S.R. 302; *D. v. Commissioner of Taxes*, [1941] Q.S.R. 218; *Territorial Waters Jurisdiction Act*, 1878, 41 & 42 Vict., c. 73.

possible to distinguish in strict jurisprudence between the interest a state has in territorial waters, and that which it claims to have in the continental shelf. The interest of the Australian States in their territorial belt stands or falls, therefore, on the nature of the interest claimed by the Commonwealth in the shelf.⁸²

If *imperium* and *dominium* do coalesce in a claim to the shelf, it must be admitted that the interest asserted by Australia in the shelf contiguous to the Trust Territory is no different in quality from the interest Australia has in the Territory itself. The High Court of Australia has been divided on the nature of that interest and the source of the Commonwealth's power over the Territory. In *Jolley v. Mainka*⁸³ it was accepted by the Court that Australia did not have sovereignty over New Guinea, but whereas Starke, J.,⁸⁴ held that the Territory was subject to Commonwealth control as a territory "otherwise acquired by the Commonwealth" within the meaning of Section 122 of the Constitution,⁸⁵ Evatt, J.,⁸⁶ held it was so subject only under the external affairs power.⁸⁷ The latter denied that the territory had ever been "acquired by the Commonwealth."

The area is not, in law or in fact, so acquired. No legal title has been vested in the Commonwealth. Legislative and administrative jurisdiction, and their exercise, are quite consistent with absence of dominion or title.

Australia's interest in the Territory derived, in his opinion, from the Treaty of Versailles. That interest, in the opinion of Starke, J., was one of "plenary control"; in the opinion of Evatt, J., expressed in *Frost v. Stevenson*,⁸⁸ it was tantamount to the enjoyment of "so much power and

⁸² Perhaps the interest now asserted by the United States in the continental shelf supports the view that the sea bed of the shelf is as much the public domain (in Australia Crown land) as the sea bed of territorial waters. That interest has been asserted in stages. In 1946 a bill containing reference to U. S. rights in the sea bed outside the States' boundaries was vetoed. H. J. Res. 227, 79th Cong., 2nd Sess.; 92 Cong. Rec. 8869, 9642, 10660. Further references were incorporated in subsequent bills, notably the Submerged Lands Act, 1953, 67 Stat. 29, sec. 9, this JOURNAL, Supp., Vol. 48 (1954), p. 109. The Outer Continental Shelf Lands Act, 1953, 67 Stat. 462, sec. 3(a), this JOURNAL, *loc. cit.*, p. 110, states: "It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act." This, as the title of Christopher's paper in 6 Stanford Law Review (1953) 23 *et seq.* suggests, is the "key to a new frontier." In *U. S. v. California* (1947), 332 U. S. 19, Mr. Justice Frankfurter drew a distinction between *imperium* and *dominium* of the sea bed (at p. 44), but Mr. Justice Black at least seems to have equated them (at p. 26); see Metcalfe, in 4 Syracuse Law Review (1952) 60 *et seq.*, and Blanton, in 5 South Carolina Law Quarterly (1953) 437, for discussion on the coalescing of *imperium* and *dominium*.

⁸³ (1933) 49 C.L.R. 242.

⁸⁴ At p. 250.

⁸⁵ "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

⁸⁶ At p. 271 *et seq.*

⁸⁷ Sec. 51 (xxix).

⁸⁸ (1937) 58 C.L.R. 528.

jurisdiction" as is necessary for Australia "to govern the territory. The power and jurisdiction are ample, but the supreme principle is that Australia is unable to treat the territory as part of its own dominions." In this latter case, the High Court held that New Guinea is "a place of His Majesty's Dominions," and therefore subject to the Fugitive Offenders Act, 1881. Latham, C. J., considered "it is a territory which has been placed by His Majesty the King under the authority of the Commonwealth," and that Section 122 was sufficient source of authority.⁸⁰

The wording of the Trusteeship Agreement,⁸¹ referring to administration of the Territory "as if it were" an integral part of Australia, would seem to exclude sovereignty in the Commonwealth, and this in fact was the view of both the Australian and United Kingdom delegations in the Trusteeship Council.⁸² The Australian cases,⁸³ however, shed little light upon the question whether the "plenary control" not amounting to sovereignty which Australia exercises over New Guinea is sufficiently intimate for the Trusteeship Agreement, with its implicitly defined boundaries of the Territory, is sufficiently rigid, to preclude administrative acts of such far-reaching definitive character as that now taken by Australia. In South Africa the trend of judicial opinion has been towards an admission of sufficient internal sovereignty over South West Africa—*majestas*, perhaps rather than *imperium*—to validate any administrative act, but against an admission of full external sovereignty.⁸⁴ The New Zealand decisions are perhaps not quite so explicit. They accept the principle that the authority of New Zealand over "Samoan affairs" is "as wide and effective as is the authority bestowed on New Zealand by its Constitution Act in relation to New Zealand affairs. No other authority can legislate for Samoa." The courts of all three countries were clearly thinking in terms of internal administrative acts, and their judgments can refer only obliquely to the question whether the Administering Power is competent to effect an alteration of boundaries.

But is the claim to the shelf an alteration of boundaries by the addition of new territory?⁸⁵ The drafting of the proclamation in declaratory form

⁸⁰ At p. 585.

⁹⁰ At p. 555.

⁹¹ Papua and New Guinea Act (Commonwealth), No. 9 of 1949.

⁹² A/258, Dec. 12, 1946. See France's statement in A/C. 4/85.

⁹³ In addition see *Mainka v. Custodian of Expropriated Property* (1924), 31 C.L. 297; *Porter v. The King, ex parte Yee* (1926), 37 C.L.R. 432.

⁹⁴ *R. v. Christian*, [1924] S.A.L.R. App. D. 101; *Winter v. Minister of Defence*, [1940] S.A.L.R. App. D. 194; *Westphal v. Conducting Officer*, [1948] 2 S.A.L.R. 13; *Minister of the Interior v. Bechler*, [1948] 3 S.A.L.R. 409; *Ex parte Schrick*, [1948] 3 S.A.L.R. 378; *Fall v. South African Railways*, [1949] 1 S.A.L.R. 638; *Van Rooyen v. South African Railways*, [1949] 1 S.A.L.R. 640.

⁹⁵ *Tagalea v. Inspector of Police*, [1927] N.Z.L.R. 883; *In re Tamasese*, 1927 N.Z.L.R. 209; *Nelson v. Braisby* (No. 2), [1934] N.Z.L.R. 559.

⁹⁶ Writers who admit property in the three-mile limit admit a corresponding extension of the national boundary. Moodie defines the continental shelf doctrine as introducing a completely new concept into the field of boundary-making. From the 200-mile mark both the boundary is a descending vertical plane; at the outer edge of territorial waters it is vertical plane from the sea bed *usque ad caelum*; in between it is an

is designed to give the impression that international law has attributed sovereignty to the Territory, that that sovereignty is inchoate in the people of the Territory, and that the Administering Power is merely making explicit what is already implicit. The nature of the question can perhaps be more readily illustrated by a discussion of the constitutional law problem raised by the proclamation referring to the Australian portion of the shelf. Here the Commonwealth seems to be faced by a series of dilemmas. It has first to avoid the appearance of an enlargement of the Commonwealth boundaries, because such enlargement probably cannot be effected by executive act.⁹⁷ It has, therefore, to rely upon the attribution of sovereignty *ab exterior*e by international law. But to what date does this attribution relate back? Only to the date the continental shelf concept crystallized as a rule of law, whenever that may have been? Or does it relate back to time immemorial? In the latter case, there may be an argument that the shelf is Crown land of the States, whereupon the Federal Government's constitutional powers over pearl fishery may be ousted. The escape from this dilemma raises yet others. If the shelf is held under the external affairs power as foreign soil, how can the Commonwealth validate its claim in international law that the shelf is merely an extension of the continental land mass, inseparably associated with it? If it is held under Section 122, how, if Justice Evatt's view is correct, can the Commonwealth "acquire" new territory for the Trust Territory? Indeed, in his view there is no doubt that no part of the shelf could be regarded as territory "acquired by" the Commonwealth since, in his opinion, Section 122 looks

not only to the acquisition of territory, but to the possibility of the representation of every such territory in the Commonwealth Parliament itself. The process envisaged is one of a gradual approach of the acquired territory towards inclusion within the existing organization of the Commonwealth.⁹⁸

Until the juridical character of the interest asserted by Australia in the shelf is substantially clarified, it is possible to do no more than hint at the difficulties. Perhaps the most satisfactory view is that international law attributes to a state an inchoate interest in its shelf in virtue of contiguity, natural extension, or legitimate interest, and that a unilateral act may accept this attribution. If this is so, Australia is merely asserting a sovereignty over the shelf latent in the Trust Territory itself, and since there is no other authority competent to take this step, it is within Australia's plenary control.⁹⁹

clined lateral plane representing the surface of the shelf. The Advancement of Science, Vol. 11 (1954), No. 41, p. 44. See Boggs, in *Geographical Review*, Vol. 41 (1951), p. 185.

⁹⁷ Colonial Boundaries Act, 58 & 59 Viet., c. 34, applied to the Commonwealth by covering clause 8 of the Constitution.

⁹⁸ *Jolley v. Mainka* (1933), 49 C.L.R. 242, at p. 279.

⁹⁹ The Indian Delegation to the General Assembly objected to trusteeship agreements not recording that sovereignty resides in the people. A/258. On the system generally, see Parry, in 26 B.Y. (1949) 122, and 27 B.Y. (1950) 183.

V. THE RELATION OF SEDENTARY FISHERIES TO THE STATUS OF THE SHELF

It has been said that necessity is the basis of Australia's linking sedentary fisheries with the shelf.¹⁰⁰ This conforms with the International Law Commission's approach and with its final draft. Initially the Commission decided, by eleven votes to one, to separate the questions of the shelf and sedentary fisheries,¹⁰¹ and it recommended that regulation of sedentary fisheries might be undertaken by the littoral state only where its nationals have "long maintained and conducted" fishing operations and only provided that foreigners are not discriminated against.¹⁰² This was instantly recognized to be one of the Commission's less convincing formulations,¹⁰³ and at its fifth session the draft was revised, after some disagreement among the members, to recommend that the regime of the shelf should include not only the mineral resources but all "natural resources," including sedentary fisheries.¹⁰⁴ Although controversial, the Commission's conclusions would seem to be a natural derivation from the concept of "utility" on which it based its doctrine of the shelf.

Some commentators on the question of sedentary fisheries have relied on a distinction between the subsoil and the sea bed,¹⁰⁵ but it is an artificial distinction that cannot be maintained in practice if installations are erect

¹⁰⁰ As the International Court put it in the *Anglo-Norwegian Fisheries Case*, I.C.J. Reports, 1951, p. 133: "there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage."

¹⁰¹ A/CN.4/SR.119, p. 20. See also A/CN.4/SR.66, pp. 6-15. South Africa and Yugoslavia agreed with the separation. A/2456, pp. 68 and 71.

¹⁰² A/CN.4/48, pp. 61-62. Of course the duty of non-discrimination implies a lack of sovereignty in the beds and this prompted the British objection to the draft. A/CN.4/SR.120, p. 17, as stated by Brierly.

¹⁰³ See British comments, A/2456, p. 7.

¹⁰⁴ As a result the draft articles on sedentary fisheries were erased and the Report emphasizes that the term "natural resources" in Art. 2 is wide enough to cover fisheries "permanently attached to the bed of the sea." A/CN.4/L.45, Add. 1 Ch. I, A/2456, par. 70; see Yepes, A/CN.4/SR.207, par. 12; Lauterpacht, par. 13; Alfa, par. 16; Hsu, par. 20.

¹⁰⁵ Mouton, *op. cit.*, p. 283; Higgins & Colombos, *op. cit.*, p. 55; Gidel, *op. cit.*, 300. Kerno, A/CN.4/SR.119, par. 74. The Saudi Arabian and Bahrain proclamations expressly reserve pearling from the regime of the shelf. This, however, is not based on the fact that pearling and oil-drilling were viewed as legally distinct categories, but because pearling in the Persian Gulf is a matter of special customary law based, as François says (A/CN.4/SR.120, par. 22; A/CN.4/42, p. 59), on "traditions respected by several states." Originally the divorce of sea bed and subsoil was in response to the view that the subsoil may be occupied from the shore, as in the case of coal mines, while the sea bed, if susceptible of occupation at all, requires different rules to avoid a collision between proprietary rights and the freedom of the seas. Oppenheim-Lauterpacht, *op. cit.*, 375-377. Some publicists, notably Mouton, have gone further and erected a practical legal distinction between sea bed and subsoil which inhibits any inclusion of the former of each within the same general status. Higgins and Colombos did not adequately explore the reasons for treating the sea bed as legally analogous to the sea. There is no physical entity called "sea bed" which can be differentiated from subsoil, although Spopoulos thinks there is, A/CN.4/SR.207, par. 37. Removal of a grain of sand from the sea bed is disturbance of the subsoil.

and oil-drilling operations are carried on.¹⁰⁶ The distinction is in reality prompted by a differentiation between mineral products and the flora and fauna that derive their life principally from the sea. There is therefore really no legal distinction between the sea bed and subsoil regarded as entities, but rather a suggested distinction of resources and species. This in turn is anchored to the doctrine of the freedom of the seas, being founded on the hypothesis that the unqualified right of fishing on the high seas is one emanation from the principle of the freedom of the seas, and that "fishing" in this context includes the exploitation of the flora and fauna of the sea bed as well as of the sea proper, embracing organisms that neither in marine biology nor in popular parlance are, strictly speaking, "fish."¹⁰⁷ There is insufficient evidence that the freedom of the seas is either so all-embracing or so absolute in character.¹⁰⁸ In fact there is no decisive authority for extending the principle of freedom of fishing beyond fishing for freely swimming organisms, whereas there is authority for excluding from the principle fishing for at least some non-swimming organisms.¹⁰⁹ In the *Behring Sea Arbitration*, for example, it appears to have been common ground that "fishing" in the international law context is limited to fishing for the former category. The United States Government contended that fur seals were to be treated as exceptional, and as analogous to sedentary species, because of the element of domestication which, it was alleged, appertained to them. The British case was based on the assertion that seals are animals *ferae naturae*, whereas the organisms embraced in the definition "sedentary fisheries" are not necessarily so. The Tribunal proceeded on a general acceptance of the British argument.¹¹⁰ The British case further treated sedentary fisheries and mineral

¹⁰⁶ Mouton's discussion only illustrates the artificiality of the distinction. *Op. cit.*, p. 283.

¹⁰⁷ See communications of France, Belgium, and Norway, A/2456, pp. 52, 43, 64; Khoury, A/CN.4/SR.119, par. 107.

¹⁰⁸ Grotius himself admitted that it may be possible to prohibit fishing where the supply is exhaustible ("*puta piscaturam qua dici quodammodo potest pisces exhaustiri*"). The Freedom of the Seas (Magoffin ed., 1916), p. 43.

¹⁰⁹ In his detailed study of the evolution of the right of freedom of fishing in Roman and feudal law, Fenn does not cite any statements of doctrine including sedentary species in the same legal category as free-swimming fish. *Op. cit.* The exclusive right of "fishing" accorded French fishermen off Newfoundland in 1713, and regulated by convention in 1857, was alleged by Great Britain to be limited on interpretation of the word "fish" to the taking of fish *stricto sensu* and not crustacea such as lobsters. The British argument, strongly contested by the French Government, is authority, perhaps, for arguing that freedom of "fishing" is limited to exploitation of free-swimming fish. Adler in 17 *Law Quarterly Review* (1901) 263. The British argument was abandoned in the Convention of April 8, 1904. On the other hand, seals are mammals, yet are subject to the doctrine of the freedom of the seas. English law contains no doctrine on mollusks and crustacea, and Scottish law is indefinite. In *Duke of Portland v. Gray* (1832), 11 S. 14, however, it was held that a grant of land "*cum piscationibus*" included "only fish *eiusdem generis* which would not include lobsters."

¹¹⁰ The British Government denied the analogy between coral beds and seal fisheries both "as to the principles governing the two cases," and "the facts to which the principles should be applied." It argued that the analogy "between

resources as equally exceptional.¹¹¹ There is thus, even on a strictly pragmatic basis, considerable argument favoring the inclusion of the natural resources of the sea bed with those of the subsoil.

The refusal of other publicists to relate sedentary fisheries to the shelf springs from the argument that the shelf is much wider than the beds.¹¹² This argument is justification for refusing to rationalize the status of the shelf on the basis of the existence on it of beds which are subject to *dominium*, but it has no bearing on the question of the intrinsic connection of the two features. Yet another argument is based on the supposed impossibility in practice, quite apart from theory, of removing the marine organisms affixed to the sea bed from the regime of the high seas. Mouton for example points out that trawling for some classes of fish, such as flounder, can only be carried on by disturbing the sea bed and its marine growth.¹¹³ It is true that an agassiz or otter trawl will pluck sponges and damage shellfish, but the objection is largely artificial, since most commercially exploitable species, and notably pearl oysters, are only found on rocky bottoms where trawling is not as a rule practiced. It does, however, raise the interesting legal problem of a hypothetical collision of two incompatible rights. Perhaps the doctrine of abuse of rights which the International Law Commission endorsed¹¹⁴ might be resorted to as a solution. Where sponges are growing on a sandy bottom, or edible oysters are attached to individual stones on a substantially level sea bed, or laid out in fairly shallow water, it would perhaps be competent to the state claiming the sea bed to require foreign nationals to employ suitable rollers on the footwire of the trawl. In this way trawling can be carried on with

the claims to protect seals in the Behring Sea, and the principles applicable to coral reefs and pearl beds is unwarranted." International law recognizes the right of a state to claim portions of the soil under the sea. "Such claim may be legitimately made to oyster beds, pearl fisheries and coral reefs; and, in the same way, mines within the territory may be worked out under the sea below low-water mark. There is an analogy between a claim to property in and to protect swimming animals, such as fish and seals, and a like claim in respect of oyster, pearl or coral beds." Speaking generally, the British Government defined the freedom of the sea as including the right "to take therefrom at will and pleasure the produce of the sea," and it may, in view of the above quotations, be concluded that "produce" in this context means free-swimming, or at least mobile, organisms, and organisms included in the term plankton. Parl. Pap. 1893, Behring Sea, U. S. No. 4 (Cd. 6921), pp. 51, 59, being a summary of the British Case (Cd. 6918) and Counter-Case (Cd. 6920).

¹¹¹ See also the argument of the Colombian delegate at the 1930 Codification Conference where he included pearls and petroleum in the term "natural resources." L.N. 351(b) M. 145(b). 1930. V., p. 150.

¹¹² Hurst in 34 Grotius Society Transactions (1949) 166.

¹¹³ *Op. cit.*, p. 135; Gidel, *op. cit.*, pp. 488-500.

¹¹⁴ This was intended as a restraint upon exhaustive exploitation, but it could equally apply in the above context. A/CN.4/L. 45, Add. 1, Ch. III; A/2156, par. 71. See generally, Lauterpacht, *The Function of Law in the International Community* (1933) p. 98; The Swift, [1901] P. 168, illustrating a conflict between property right of oysters and the right of navigation, actually decided on the ground of negligence of the navigator. See *State v. Taylor*, 27 N.J.L. 117; *Fleet v. Hegeman*, 14 Wend (N.Y.) 12; *Decker v. Fisher*, 4 Barb. (N.Y.) 592; *Lowndes v. Dickerson*, 34 Barb. (N.Y.) 565.

the minimum of damage to the products of the sea bed, and a satisfactory reconciliation of competing rights would result.

Discussions on the subject of sedentary fisheries have traditionally avoided strict classification. Sometimes a distinction is drawn between sedentary, or sometimes demersal, fisheries and pelagic fisheries, but it is a distinction neither fully antithetic nor sufficiently comprehensive. François uses the term "sedentary" in both the sense of oyster fisheries and fishing by fixed installation for swimming organisms.¹¹⁵ Perhaps a valid legal distinction may be erected between sessile benthos such as oysters, sponges and seaweed on the one hand, and motile benthos, such as crabs and cockles, and nektonic (swimming) organisms on the other hand. Virtually all sessile organisms are affixed in some form or other to the sea bed, and this perhaps permits of an application of the categories of property law to the problem of their assimilation to the status of the sea bed. They may be said to partake of the character of "fixtures" or "*fructus*." The pearl oyster, for example, affixes itself early in life to the sea bed by means of a byssus and does not thereafter move. Although it derives its life from the sea and not from the subsoil, it bears a close analogy to a tree or plant in that it depends upon its intimate association with the sea bed for continued existence. If removed and exposed it will suffocate; if detached, it will immediately affix itself again. The sponge and the pearl oyster are therefore susceptible of being classified together. Both are products of the soil and both are cultivated and harvested. Travers Twiss recognized the "farming" aspects of certain underwater fisheries in his opinion to the British Government of July 18, 1871, in which the term "*fructus*" is applied to sponges and polypi¹¹⁶; and the United Kingdom, adopting this view and specifically quoting Hurst¹¹⁷ on the point, has described pearl oysters as "*fructus of the soil*."¹¹⁸ In the *Behring Sea Arbitration* it argued that

as to oysters and coral beds when they are within the waters over which international law recognizes an exclusive fishery right, this right becomes equivalent to a right of property because they are attached to the soil. But in animals which move from this area into the high seas no such property can be acquired.¹¹⁹

Westlake, commenting on the physical connection of oysters with the sea bed, uses the word "territorial" to describe the character of the fishery.¹²⁰

¹¹⁵ A/CN.4/17, p. 31. In their communications to the Commission a number of states referred to the inherent ambiguity in the term "sedentary fisheries" as used by François and adopted by the Commission. A/2456, especially France, p. 52; Netherlands, p. 62; Norway, p. 64; Philippines, p. 65. As Denmark pointed out (p. 48), there are arguments favoring *dominium* of organisms trapped in installations, but they are different from the arguments relating to the identification of the natural products of the sea bed. A/CN.4/SR. 120, par. 6.

¹¹⁶ Smith, *op. cit.*, p. 121.

¹¹⁷ 4 B.Y. (1923-24) 34.

¹¹⁸ A/2456, p. 70.

¹¹⁹ *Loc. cit.*

¹²⁰ *Op. cit.*, p. 190; see also Hyde, *International Law* (2nd ed., 1945), Vol. I, pp. 759-60. Scelle admits that ownership of sedentary fisheries has in the past implied ownership of the sea bed. A/CN.4/SR. 119, par. 108. The fixture argument seems

English law contains no comprehensive doctrine on the classification of fish,¹²¹ although in *Smith v. Maryland*¹²² oyster regulations were upheld partly on the ground that the State owned the soil. Scottish law, however, seems to accept the distinction above suggested, and classifies oysters and mussels as appurtenant to the soil, and cockles and other unattached shellfish as not.¹²³ In *Sutherland v. Watson*¹²⁴ Lord Neave commented that mussel scalps are *partes soli* because, although the mussels have powers of locomotion, once they settle down and fix their domicile, they do so *animo remanendi*, and become "part of the soil." The pearl oyster is really a type of mussel,¹²⁵ and it is no more an objection to its identification with the sea bed that the spats float about until they settle, than it is an objection to the ownership of a plant that the seeds blow about.¹²⁶

to be adopted by Córdova, A/CN.4/SR. 205, par. 77. Mouton challenges the use of the term "*fructus*" but does admit a sort of property right in the banks. *Op. cit.*, p. 138 *et seq.*

¹²¹ Sea Fisheries Act, 1868, 31 & 32 Vict., c. 45, s. 41. Removal of all marine products is a common law right which can only be altered by a grant of several fishery. *Goodman v. Mayor of Saltash* (1882), 7 App. Cas. 633; *Corporation of Truro v. Row*, [1902] 2 K.B. 709. The Court of Appeal in *Foster v. Urban District Council of Warblington*, [1906] 1 K.B. 648, however, does seem to have implied that proprietary rights in a tidal area involved proprietary rights in objects upon it. Fletcher Moulton, L.J., said that the right of oyster-laying "would exist as a reasonable exercise of his ownership of the soil by an individual in whom the soil of the foreshore was vested." In addition, in *Seratten v. Brown* (1825), 4 B. & C. 485, it was held that a grant of oyster layings passes the soil. See *The Swift*, [1901] P. 168. The classic case of *Bagot v. Orr*, 2 Bes. & Pul. 472, is unsatisfactory because it turned on a point of pleading (Moore, *The Law of Fisheries*, p. 96); Hall, *An Essay on the Rights of the Crown and Privileges of the Subject in the Sea-shores* (2nd ed., 1875), p. 209; Lemmoa, *Public Rights in the Seashore* (1934), p. 90. It was argued (quoting Grotius) that freedom of fishing implied freedom to remove shells and shellfish from the seashore. The court left open the question whether a distinction was to be drawn between fish and shellfish.

¹²² (1855) 18 How. (U. S.) 71. See *Murphy v. Ryan* (1868), 2 Ir. Rep. C. L. 142; *Grace v. Willetts* (1888), 50 N.J.L. 414.

¹²³ Rankine, *Land Ownership in Scotland*, p. 236. In *Parker v. Lord Advocate* (1904), 41 S.L.R. 491, [1904] A.C. 364, it was held that the right of the Crown to mussels was not a public but a patrimonial right because the mussels are "closely associated with the ground." Oysters were mentioned in the same context. On limpets see *Hall v. Whillis* (1852), 14 D. 324; lobsters, *Duke of Portland v. Gray* (1833), 11 S. 14.

¹²⁴ (1868) 6 M. 99. See also *Lindsay v. Robertson* (1868), 7 M. 239.

¹²⁵ *Parker and Haswell, A Text Book of Zoology* (1921), Vol. I, p. 685; *Fowler and Allen, The Science of the Sea* (1928), p. 302; *Herdman, The Pearl Oyster Fisheries of the Gulf of Manaar, Report to the Government of Ceylon* (1903), Vol. I, pp. 125-146; *Nicholls, in Reports of the Great Barrier Reef Committee* (1931), Vol. III, pp. 26-29.

¹²⁶ *Fulton*, referring to the Convention of Paris of August 2, 1839, reserving oyster beds in Granville Bay exclusively for French fishermen, suggests that this implies a recognition by the British Government that sedentary fisheries require "special treatment." *Op. cit.*, p. 612. The instance he cites is probably explained on the ground that Granville Bay is inland waters, but *Fulton's* principle has wide currency. *Higgins and Colombos* say they present "special features," *op. cit.*, p. 100. See the views of the British Government in H. C. Deb. 5s. 163, col. 1417-18, where the Under Secretary for Foreign Affairs stated that "pearl fisheries stand on a different footing to the ordinary kind of fishing in the waters of the sea."

The Australian Pearl Fisheries Regulations,¹²⁷ however, treat pearl oysters, trochus, bêche-de-mer and green snails as a class. It may well be that the Regulations will be enforced against foreigners only in respect of the oysters, but the legislation as it stands leaves the definition of sedentary fisheries ambiguous. The term "bottom-fish," used by the International Law Commission¹²⁸ to describe a class of organisms which are excluded from the regime of the shelf, was probably intended to refer to nektonic organisms, but it seems it should be extended to any marine animals that are mobile and neither partake of the character of the sea bed nor depend upon it for their existence. Trochus, bêche-de-mer and snails, although their radius of movement is severely limited, have no physical connection with the sea bed.

There seems to be no theoretical or practical objection to the assimilation of at least some categories of marine life and growth to the sea bed, and in fact some species—notably pearl oysters, which, depending upon light penetration, are normally found off the Australian coast under 40 fathoms—exhibit a peculiar affinity with the continental shelf. The Australian claim, however, is not to be considered from the narrow viewpoint of contemporary international law. It is mainly another manifestation of the pressure exhibited in many areas of the world towards a drastic revision of the historic doctrine of the freedom of the seas in the light of modern scientific knowledge and conservation measures. The freedom of the seas was postulated at a period when the alternative to a common enjoyment was an exclusive one. Australia has made it clear that it claims an exclusive interest only to preserve the fisheries, and that it has no intention of discriminating against foreign nationals in the granting of licenses and the supervision of harvests. If conservation measures can be achieved by bilateral or multilateral arrangements, there will be no need for international law to alter its content; if they can be achieved only through the application of doctrines of property law, it is to be expected that state practice will in the future effect the alteration.¹²⁹ Nor, so long as the doctrine of abuse of rights can be employed in a liberal context, will this be an undesirable development.

The following conclusions are tentatively advanced:

1. The sea bed is *res nullius*, and occupation is the mode of its appropriation. Occupation requires:
 - (a) a formal and exclusive claim manifesting *animus*;
 - (b) a prior and continuous exploitation constituting the *factum*.
2. The continental shelf doctrine is a generic one independent of occupation.
3. It is based on the legitimate interest which the littoral state has in the sea bed contiguous or appurtenant to it. The area of sea bed is defined by positive practice of nations as that within the 100-fathom line.

¹²⁷ Statutory Rules, 1953, No. 84.

¹²⁸ A/CN.4/L.45, Add. 1, Ch. III; A/2456, par. 70.

¹²⁹ See Fauchille, *op. cit.*, p. 147.

4. International law invests the littoral state with the right to claim full sovereignty over the shelf.

5. Until such claim is made, the littoral state's interest is inchoate. Accordingly, no claim can be effective over such portion of the shelf as has been occupied by another state.

6. The Administering Power of a Trust Territory is competent to claim the continental shelf for the territory.

7. In general, and unless municipal law otherwise provides, *ius imperium* and *dominium* coalesce in a claim to the continental shelf.

8. A claim to the continental shelf is accordingly effective to the extent appropriate to the littoral state the mineral deposits of the shelf and the marine organisms that can be legally assimilated to it.

9. Such organisms are those affixed in a permanent manner to the sea bed.

10. *Dominium* of the sea bed constituted either by occupation or by a claim to the continental shelf requires that the national and foreign states shall exercise their international legal rights of navigation and fishing in such a way as to cause the minimum of interference with the littoral state's interest.

11. Likewise, the littoral state must exploit its resources in such a way as to occasion the minimum of interference with the international legal rights of navigation and fishing of foreign nationals.

EDITORIAL COMMENT

THE LONDON AND PARIS AGREEMENTS ON WEST GERMANY

In order to understand fully the recent London¹ and Paris² Agreements on West Germany, it is, in addition to a strictly legal analysis, indispensable to take into consideration the whole political background which produced these treaty norms: the deep split, the "tension of hegemony" between West and East, led, respectively, by the United States and the Soviet Union. This tension has made necessary Western strength through rearmament, the creation of NATO, attempts at some union between the states of free Europe, attempts aided economically and militarily by the United States; in the view of American and British strategists, such strengthening of the West imperiously demands the rearming of a sovereign West Germany, a consequence of the fact of her sensational economic recovery and of the fighting ability of her men. But such revival of a German Army has to guard against German militarism and overcome French fears.

A first attempt was made through the Bonn Agreements of May 26, 1952,³ and the Treaty establishing the European Defense Community (EDC),⁴ signed at Paris on May 27, 1952. With the long-expected denial of ratification of the EDC Treaty by the French Parliament on August 30, 1954, the Bonn Agreements, indissolubly linked to the EDC Treaty, became dead also. The present London and Paris Agreements are the outcome of a frantic search for a "second-best" solution of the problem. The basis was laid by the efforts of the British Foreign Secretary. The United Kingdom convoked the Nine-Power Conference⁵ at London; here the basic decisions were made. Experts translated them into international documents, presented, accepted and signed at the Paris Conference on October 23, 1954. These Agreements, some between two, three, four, seven, nine or all the fourteen NATO Powers, form a vast and intricate network of interconnected Conventions, Declarations, Agreements, Resolutions, Protocols, Statements and Exchanges of Letters, all dedicated to the purpose of strengthening the security structure of the free world through a defense contribution by a sovereign West Germany.

There were, therefore, two principal problems: sovereignty of West Germany and a West German defense contribution. At the London Con-

¹ Nine-Power Conference, held in London from Sept. 28 to Oct. 3, 1954. Text of the Final Act in Department of State Bulletin, Vol. 31, No. 798 (Oct. 11, 1954), pp. 516-531.

² Results of Paris Conference. *Ibid.*, No. 803 (Nov. 15, 1954), pp. 719-733.

³ See this writer's editorial in this JOURNAL, Vol. 47 (1953), pp. 106-114.

⁴ See this writer's editorial, *ibid.*, pp. 275-281.

⁵ Belgium, Canada, France Federal Republic of Germany, Italy, Luxembourg, The Netherlands, United Kingdom, United States.

ference an agreement was reached between the three Western Occupying Powers to end the occupation regime, to revoke the Occupation Statute and to abolish the Allied High Commission. In the meantime the three Western Powers issued a Declaration of Intent, "recognizing that a great country can no longer be deprived of the rights properly belonging to a free and democratic people" and expressing the desire "to associate the Federal Republic of Germany with their efforts for peace and security on a footing of equality." The last-quoted words are the key words. These basic decisions were worked out into diplomatic texts, signed at Paris on October 23, 1954. The first, concluded between the three Western Powers and West Germany, is the Protocol on the Termination of the Occupation Regime. It puts the Bonn Agreements of May 26, 1952, which had lapsed through the non-ratification of the EDC Treaty, into force, but with certain changes.⁶ The first change is that this Protocol stands by itself and is not made dependent on the coming into force of the arrangements for a West German defense contribution. That is why Article 2 of the Protocol provides that, pending the entry into force of these latter arrangements, the rights heretofore exercised by the three Western Occupying Powers relating to the fields of disarmament and demilitarization shall, prior to the ratification of this Protocol, be retained by them; thereafter the Military Security Board shall be abolished and the controls in the fields of disarmament and demilitarization shall be applied by the Joint Four-Power Commission which shall consist of one representative of each of these four Powers and take its decision by majority vote. These arrangements are subject to review with the view to permitting the preparation of the future West German defense contribution.

The Bonn Agreements of 1952, adopted with changes by this Protocol, consist of the Convention on Relations and the so-called related conventions.⁷ The changes made are contained in five Schedules⁸ accompanying the Protocol. The changes in the related conventions are mostly of a technical nature: to eliminate the many references to the defunct EDC Treaty, taking into account that almost three years have elapsed since the signing of the Bonn Agreements, that certain Allied programs have been completed in Western Germany, and eliminating certain clauses which, in the words of the American Secretary of State, "were not felt to be in harmony with the status of equality being accorded to the Federal Republic."

The most important changes were made in the Bonn Convention on Relations; some are also inspired by the motive of granting equality to West Germany. That is the case with the change made in Annex B of

⁶ See also the Report of the Secretary of State to the President of Nov. 12, 1954 (Department of State Bulletin, Vol. 31, No. 806 (Dec. 6, 1954), pp. 849-856).

⁷ Convention on the Rights and Obligations of Foreign Forces, Finance Convention, Convention on the Settlement of Matters Arising out of the War and Occupation. Texts in Senate Execs. Q and R, 82nd Cong., 2nd Sess., Washington, 1952.

⁸ Texts in London and Paris Agreements, September-October 1954 (Department of State Publication 5659, International Organization and Conference Series II (European and British Commonwealth), 5), pp. 65-94.

the Bonn Convention on Relations. This Annex B contains the Charter of the Arbitration Tribunal. Here the most interesting power of jurisdiction of this Tribunal, namely, to annul, directly and with binding effect in the Federal Territory, certain laws, administrative measures and judicial decisions, was eliminated. For the same reason the retained right of the three Western Powers to the stationing of armed forces in West Germany was given up as a retained right and a new and separate Convention on the Presence of Foreign Troops in the Republic—the second of the Paris documents—was concluded with West Germany. On the other hand, Chancellor Dr. Adenauer, in a letter to Sir Anthony Eden, recognized the continuing validity of Article 5, paragraph 7, of the Bonn Convention on Relations, according to which “independently of a state of emergency, any military commander may, if his forces are immediately menaced, take such immediate action appropriate to their protection (including the use of armed force) as is required to remove the danger.” Article 3 of the Convention on the Presence of Foreign Troops contains a revision clause, as provided in Article 10 of the Bonn Convention on Relations, and provides that the convention shall expire with the conclusion of a German peace settlement or if at an earlier time the signatory states agree that the development of the international situation justifies new arrangements.

The retained right of the three Western Powers with regard to Berlin is preserved. In London they declared that they will maintain armed forces within the territory of Berlin as long as their responsibilities require it, and will treat any attack on Berlin from any quarter as an attack on their forces and themselves. To this security guarantee was added at Paris the declaration of their intention to ensure the greatest possible degree of self-government in Berlin compatible with Berlin's special situation.

Equally, the retained right of the three Western Powers with regard to “Germany as a whole,” including its unification and a peace settlement, was preserved. They had already declared at London that a freely negotiated peace settlement for the whole of Germany remains an essential aim of their policy and that the final determination of the boundaries of Germany must await such a settlement; they had also declared that the achievement through peaceful means of a fully free and unified Germany remains a fundamental goal of their policy. The Protocol makes important changes with regard to the issue of the reunification of Germany. Whereas Article 10 of the Bonn Convention on Relations provided for its review in the case of actual reunification, there is now added a proviso for review also in case an international understanding is reached, with the participation and consent of the four governments, on steps toward bringing about the reunification of Germany. There are also important negative changes. Paragraph 7 of the Preamble of the Bonn Convention on Relations defined the integration of a reunified Germany within the European community as the settled policy of the three Western Powers and of the West German Government. Article 7, paragraph 3, stipulated that the three Western Powers will extend to the unified Germany the rights of the Federal Republic under the Bonn Convention on Relations and the related conventions and will for their part agree that the rights under

treaties for the formation of an integrated European community should be similarly extended, upon the assumption by such a unified Germany of the obligations of the Federal Republic toward the three Powers or to any of them. These two last-quoted provisos were not carried over into the Paris Protocol. The reason probably was that with the death of the EDC Treaty the European Community was out of date. But from this omission far-reaching legal consequences have been drawn by Professor Grewe, legal adviser of the Bonn Government, namely, that this omission shows also that the arrangements for West Germany's entry into NATO bind only West Germany and not a unified Germany. This had to be admitted by the representatives of the three Western Powers even at the Berlin Conference, held at the beginning of 1954. This shows that there is no legal continuity and identity: a sovereign West Germany is not identical with pre-war Germany, but a new state, a successor state; and a re-unified Germany will again be a new state, not bound in law by the treaties of West Germany. It is clear that this legal interpretation has far-reaching political consequences.

The second great problem at London and Paris was the integration of this sovereign West Germany into the Atlantic Community and provision for a new West German defense contribution. The complicated arrangements arrived at were dictated by British-American demands that the new security structure be reliable, by West Germany's wish for equality and non-discrimination, and by the desire to overcome French fears and reluctance. The way was prepared at London through the declaration of the American Secretary of State and the British Foreign Secretary, who, on behalf of the United Kingdom, made the far-reaching and unprecedented commitment that Great Britain will continue to maintain on the European Continent four divisions and the tactical air force and will not withdraw them against the wishes of the majority of the Brussels Treaty Powers, a commitment which may last until the end of this century.

After the death of the EDC Treaty the simplest way of integrating a rearmed West Germany would have been her direct admission to NATO. But France insisted on control of West German rearmament, first of all through an European organization in which Great Britain, contrary to the EDC Treaty, is a member. Hence the Brussels Treaty of March 17, 1948, creating the Western European Union (WEU)⁹ which had been completely overshadowed, especially with regard to its military features, by the North Atlantic Treaty,¹⁰ was suddenly brought into the foreground, but with important changes. The Brussels Treaty was originally an anti-German alliance,¹¹ as clearly expressed in its text.¹² Nothing could better

⁹ Text in Department of State Bulletin, Vol. 18, No. 462 (May 9, 1948), and reprinted *ibid.*, Vol. 31, No. 798 (Oct. 11, 1954), pp. 528-530. See this writer's editorial in this JOURNAL, Vol. 42 (1948), pp. 868-877.

¹⁰ Signed at Washington April 4, 1949.

¹¹ Just as the British-Soviet Treaty of 1942, the French-Soviet Treaty of Dec. 10, 1944, concluded for twenty years by the provisional regime of General Charles de Gaulle, and the British-French Treaty of Dunkirk of 1947.

¹² In the Preamble and in Art. VII.

illustrate the "*revirement des alliances*" than the fact that this anti-German treaty was to become a treaty of alliance with West Germany. But as the changed Brussels Treaty was intended also to supervise the arming of the new ally, it now reads, rather ironically, less like a treaty of alliance providing for minimum contributions like NATO, but like a treaty for the reduction of armaments providing for maximum contributions. Finally the changed Western European Union had to be built into NATO. In order to satisfy the British wish for absolute sovereignty, all the supervision had to be restricted to the Continental Brussels Powers. In order to satisfy West Germany's wish for equality and non-discrimination, France and the other Continental Brussels Powers had to accept supervision, too. Yet, the discrimination in fact regarding West Germany is veiled by the declaration of the West German Chancellor: West Germany undertakes voluntarily not to manufacture in its territory any atomic, chemical and biological weapons¹³ or any of the weapons detailed in paragraphs IV, V and VI of Annex II to Article 107 of the EDC Treaty.¹⁴ Here, elements of the defunct EDC Treaty were taken over, just as the West German defense contribution maximum is identical with that provided for by the EDC Treaty. Also very important is West Germany's commitment that it will refrain from any action inconsistent with the strictly defensive character of NATO and WEU, and that it will never have recourse to force to achieve the reunification of Germany or the modification of the present boundaries of West Germany.

On this foundation the basic decisions, as to the Brussels Treaty, were taken at London and the corresponding documents were signed at Paris. They consist, first, of the Declaration inviting Italy and the Federal Republic of Germany to accede to the Brussels Treaty as modified by four Protocols. Protocol I deletes the anti-German features, extends the WEU to Italy and West Germany, adds close co-operation with NATO (any duplication with NATO, particularly in military matters, will be avoided), states the wish "to promote the unity and encourage the progressive integration of Europe," and creates a Council which, *inter alia*, is also dedicated to "close cooperation with other European organizations." The Council is empowered to set up necessary subsidiary bodies and to establish immediately an Agency for the Control of Armaments, and is bound to make an annual report to another newly created organ, the Assembly, composed of representatives of the Brussels Treaty Powers to the Consultative Assembly of the Council of Europe. Protocol II deals with the Forces of WEU, Protocol III with the control of armaments, Protocol IV with the Agency for the Control of Armaments, its organization¹⁵ and its

¹³ As detailed in Annex II to Art. 107 of the EDC Treaty.

¹⁴ Namely, long-range missiles, guided missiles and influence mines, naval vessels other than minor defensive craft, and military aircraft. Any amendments as to these weapons can, on the request of West Germany, be carried out by a two-thirds majority of the Brussels Council of Ministers, if a request to this effect is made to NATO.

¹⁵ A Director, a Deputy Director and a staff, drawn equitably from nationals of the Brussels Treaty Powers. The Director shall submit to the Council a plan for the organization of the Agency. The Agency will have departments for its different tasks:

tasks. The Control Agency is directed to supervise the non-manufacture of certain arms which West Germany has voluntarily undertaken not to manufacture and with the control of stocks of arms by the other Continental Brussels Treaty Powers. The United States retains full authority to determine allocation of U. S. military assistance. The French Prime Minister's wish for unification of production and standardization of armaments was not adopted, but a resolution was taken to convene a Working Group of the Brussels Treaty Powers on January 17, 1955, at Paris to study the draft directives submitted by the French Government on October 1, 1954, with a view to submitting proposals to the Council of the Western European Union.

The basic decisions as to bringing the changed WEU into NATO were also taken at London and the corresponding documents signed at Paris. The first is the Protocol to the North Atlantic Treaty on the accession of the Federal Republic of Germany. The second is the very important Resolution to increase the powers of the Supreme Allied Commander Europe (SACEUR).¹⁶ Of great importance also is Section IV of the Final Act of the London Conference recording the view of all the NATO governments that "the North Atlantic Treaty should be regarded as of indefinite duration."

This whole complicated network of agreements is based on a very thin foundation: the bilateral French-West German Saar Accord of October 23, 1954.¹⁷ It provides for "a European Statute of the Saar within the framework of WEU." The interests of the Saar in the fields of foreign affairs and defense are represented by a European Commissioner, appointed by and responsible to the Council of the WEU, who may be neither a Frenchman nor German nor Saarlander. The "*rattachement économique à la France*" is fully maintained and reinforced: customs union, currency union, French domination of the coal, iron and steel industry in the Saar. Gradual economic ties between the Saar and West Germany are promised, but they must not endanger the dominant French position in the Saar. Concessions to West Germany are that the European Statute is only valid "until the conclusion of a peace treaty" and that it must be approved by a plebiscite. This plebiscite will be held three months after the freeing of political parties, associations, newspapers and public meetings. Once the European Statute is approved, it can no longer be questioned or attacked until the conclusion of a peace treaty. France and West Germany

departments dealing with the examination of statistical and budgetary information, inspection, test checks, and administration.

¹⁶ All deployment of troops shall be in accordance with NATO strategy; the location of forces is to be determined by SACEUR after consultation with the national authorities concerned; these forces shall not be redeployed or used operationally without the consent of SACEUR. The integration of forces will, as a rule, remain at Army Group and Tactical Air Force level. The powers and responsibilities of SACEUR for the logistic support of the forces placed under its authority will be increased; SACEUR will also have control over higher training of all national forces assigned to its command in peacetime. The "area" of SACEUR will not include North Africa.

¹⁷ English text in New York Times, Oct. 26, 1954, p. 4.

guarantee the European Statute until the conclusion of a peace treaty and will ask the British and American governments to do the same.

If we consider the London and Paris Agreements as a whole, we may say that they constitute the best possible substitute solution and will, if ratified and executed, contribute to strengthening the security structure of the free world. But, as was indicated by earlier developments, the idea of a union of free Europe is, unfortunately, in retreat. This is shown by the death of the EDC Treaty, the new French nationalism, the resignation of Jean Monnet, Chairman of the High Authority of the European Coal and Steel Community, and the elimination of all "supra-national" features in the new agreements. To that comes the weakness of the basic Saar Accord, on the ratification of which the coming into force of the whole treaty arrangement depends. Perhaps the hope expressed by the American Secretary of State¹⁸ that "now we have both the Saar and Trieste problems settled" and that they "are no longer there to be unsettling of the whole situation," is over-optimistic. It should also not be overlooked that Italian Trieste was returned to Italy, whereas the intent of the Saar Accord is to separate permanently the one hundred percent German Saar from Germany. The Saar Accord is, of course, heavily attacked in West Germany; even the Chancellor of West Germany, who remains optimistic,¹⁹ had to concede "a profound divergence of views" between France and West Germany. For the latter the Saar Accord is a temporary agreement which leaves German sovereignty over the Saar intact; for France the Accord is final, as expressed by Gilbert Grandval, French Ambassador to the Saar. The London and Paris Agreements are again provisional only, as the many references to a German peace treaty, the settlement of Germany's frontiers and the problem of reunification of Germany show. The whole treaty arrangement also presupposes a real conciliation between France and Germany, a permanent and sincere co-operation, and for that the present situation offers no guarantee. But the first necessity now is the ratification, the second, the execution of the London and Paris Agreements, the building up of a strong, reliable and yet not militaristic German Army.

JOSEF L. KUNZ

THE MONETARY GOLD DECISION IN PERSPECTIVE

The somewhat involved decision of the International Court of Justice in the Case of the Monetary Gold Removed from Rome in 1943,¹ which copes with such a novelty to the judicial process as an attack on jurisdiction by a plaintiff, also brings to a curious resting point one phase of a post-World War II experiment in international legal remedies: restitution *in specie*.

¹⁸ In his televised report to the President and the Cabinet at the White House on Oct. 25, 1954. Department of State Publication 5659, p. 7.

¹⁹ See Konrad Adenauer, "Germany, the New Partner," in *Foreign Affairs*, Vol. 33 (1955), pp. 177-183.

¹ I.C.J. Reports, 1954, p. 19; digested in this JOURNAL, Vol. 48 (1954), p. 649.

The principle of specific restitution of illegally taken property is not, of course, an innovation of the World War II period. It seems fair to say, however, that the settlements proposed for that war made greater use of the remedy than ever before. The restitution of monetary gold was a particularized aspect of a broader remedy based upon the principle of the return of objects illegally taken² by the Axis occupiers. Both the general remedy and its specialized version for monetary gold were developed out of very great deference for the teachings of John Maynard Keynes about the unwisdom, indeed the immorality, of the reparation charges against Germany following World War I.³ A principal, and posthumous, effort in rejoinder to Keynes⁴ was not available when the planning was done. Most likely it would have made no difference. The basic idea of restitution was to undo injustice and to restore war-disrupted order as an alternative to a large reparation bill against Germany.⁵

In the case of monetary gold the general anti-reparations policy referred to was paralleled by two others: one a wartime economic warfare measure and the other a viewpoint on liberated areas' monetary policy. The economic warfare measure was expressed in the United Nations Gold Declaration of February 22, 1944, which was designed to make it as difficult as possible for Germany to use in her aggression gold she had looted from occupied countries, Allied research having indicated that by that time Germany had well exhausted the gold with which she entered the war. The Gold Declaration built upon an earlier Allied Declaration on Axis Acts of Dispossession, January 5, 1943,⁶ which itself is the most authoritative pre-peace treaty statement of the general restitution principle.

After United States Forces found substantial quantities of monetary gold in a salt mine near Merkers, Germany, attention also began to be paid to certain postwar implications of this discovery. Although some of the gold was possibly identifiable, a good deal of it certainly was not; and, moreover, the extent to which the Germans had dipped into one cache of looted gold rather than another appeared to be haphazard. Within the Depart-

² A taking by force or duress was dealt with as illegal. Identification of the property was required. Return was made to the government of the country from which the removal took place.

³ Keynes, *Economic Consequences of the Peace* (1920), esp. pp. 53-55, 226-251.

⁴ Mantoux, *The Carthaginian Peace or The Economic Consequences of Mr. Keynes* (Pub. 1946, after the brilliant young French economist author was killed in one of the last engagements of World War II in Europe).

⁵ The United States, Britain and France resisted reparations claims against Italy on the ground of her incapacity to pay. In the case of Germany, reparations were limited to amounts far smaller than the total of war claims against Germany, being restricted to the taking of German external assets and the removal of certain plant equipment from Germany estimated to be in excess of that country's peacetime needs. In contrast, the Soviet Union sought large reparations from Italy, and it was on the Soviet claim for reparations of \$10,000,000,000 in current manufactures from Germany that the quadripartite control of Germany foundered. See Clay, *Decision in Germany* (1950), Ch. 7. The full history of the impact of changing circumstances and conditions on German and Japanese reparation policy remains to be written.

⁶ Editorial, this JOURNAL, Vol. 37 (1943), p. 282.

ment of State, in connection with the preparation of instructions for the American Delegation to the Paris Conference on Reparations, the position developed that the restitution of looted monetary gold should not follow an accidental pattern established by the Germans but, rather, that the gold should be returned in such a way as to maximize its contribution to the restoration of monetary stability in the ravaged countries. These proposals encountered opposition in the Treasury Department, the view there being expressed that the gold should be claimed by the United States as war booty.⁷ However, the United States Delegation was finally instructed to seek in the Paris Reparation Agreement the adoption of a "gold pool" principle, whereby the looted gold would be returned to the various countries which lost gold to Germany in the proportion of their losses to total losses.⁸

Part III of the Paris Agreement on Reparation⁹ put the "gold pool" into legal effect. Albania was a party to the agreement. The agreement provided for eventual participation by Italy and Austria, and they were later allowed to participate. By Part III of the Paris Agreement also, the United States, the United Kingdom and France, as the Occupying Powers concerned, were put in charge of the gold restitution operation. To accomplish this purpose the three Powers established the Tripartite Commission on Restitution of Monetary Gold,¹⁰ an organization separate from, but staffed at the top by the same persons appointed by these countries as their delegates to the Inter-Allied Reparation Agency.¹¹ The Tripartite Gold Commission, its coffers swelled by some gold recoveries from neutral countries,¹² went about its work over several years, receiving claims and making awards. The Bank of England became its custodian pending restitution deliveries, and a private claim for the return of seized

⁷ A viewpoint which, aside from its economic shortsightedness, also had the disadvantage of supporting by emulation Soviet seizures of industrial property in Manchuria and in Southeastern Europe as "war trophies."

⁸ A sidelight of sorts is cast on the lawyer's rôle in the making of foreign policy through international agreements by the recollection that the American gold pool [sometimes less elegantly called "pot"] had to be explained to the British in terms of the maritime insurance concept of the "general average" and to the continentals [thanks to a suggestion from one of the most scholarly among them] by reference to the *Lex Rhodia de Jactu*, preserved in the Pandects, Dig. 14.2.1; cf. 3 Kent, Comm. 232, 233.

⁹ T.I.A.S. No. 1655, in force Jan. 24, 1946; this JOURNAL, Supp., Vol. 40 (1946), p. 117; described in Howard, *The Paris Agreement on Reparations from Germany*, Dept. of State Bulletin, Vol. 14 (1946), p. 1023 *et seq.*, esp. p. 1027.

¹⁰ See *ibid.*, Vol. 15 (1946), p. 563, reporting the establishment of the Commission, Sept. 27, 1946.

¹¹ Established by Part II of the Paris Agreement on Reparation to apply the principles of dividing German assets available to the Western countries for reparation. See Howard, *The Inter-Allied Reparation Agency*, Dept. of State Bulletin, Vol. 14 (1946), p. 1063.

¹² The Paris Agreement, Part III-G envisaged the possibility that the Allied Powers might get back from certain neutral countries gold they had received from Germany. There were such recoveries.

gold was successfully met by the Bank's plea of sovereign immunity on behalf of the Tripartite Powers.¹³

During the whole period, however, a contention regarding certain gold seized by the Germans at Rome and claimed by Albania to have been illegally dealt with by Italy and by Italy to have been Italian, remained unsolved. In May, 1951, the three governments, the Tripartite Commission not having been able to reach a conclusion, announced an agreement between themselves, but without Italy or Albania, out of which "settlement" the present unsettlement arose.¹⁴ The agreement was to submit to an arbitrator the question whether the gold looted at Rome was originally the property of Italy or of Albania when carted away by the retreating Germans. To this extent the agreement merely involved the selection of a method of determination in lieu of the Tripartite Commission, whose initial decision was declared withdrawn.

A new and decidedly novel element was, however, then injected into the agreement: If the arbitrator should decide that under Part III of the Paris Agreement on Reparation the looted gold had at the time of its looting been the property of Albania, a further series of questions would then arise. These involved the competing claims of the United Kingdom and of Italy to the gold, assuming it to be the property of Albania. The British claim was based on the unsatisfied judgment of the International Court of Justice in the *Corfu Channel Case*; that of Italy upon the alleged confiscation by Albania of the assets of the National Bank of Albania, largely owned by the Italian Government.¹⁵ The three governments announced their agreement as follows: If the arbitrator should find that the proper "gold pool" claim was that of Albania, then the United Kingdom should have the gold, unless within 90 days after the arbitral award in favor of Albania on the restitution claim (a) Albania should contest the transfer to Britain before the International Court of Justice or (b) Italy should contest before that Court (i) the arbitral award to Albania under the "gold pool" right or (ii) the granting of priority to the British claim as between the two derivative contenders for the gold.

The arbitrator found that the valid gold pool claim under the Paris Agreement¹⁶ was Albania's. Thereafter there came the acceptance by Italy of reference to the International Court of Justice, Albania having taken no notice of the opportunities furnished her for resort to that tribunal by the agreement of the three Powers.

Thus the stage was set for the unorthodox: Italy took formal steps to come within the time limitation fixed in an agreement to which she was

¹³ *Dollfus Meig et Cie., S. A. v. Bank of England*, [1950] 1 All E. R. 747; *ibid.*, [1950] 2 All E. R. 605; digested in this JOURNAL, Vol. 44 (1950), p. 592; Vol. 45 (1951), p. 383.

¹⁴ Quoted in full in Dept. of State Bulletin, Vol. 24 (1951), pp. 785, 786-787.

¹⁵ However, the nature of the Italian claim seemed to raise once again the basic question left to the arbitrator; compare the announcement with the signed agreement, cited above, note 14.

¹⁶ This writer has not been able to find an original source for the arbitral award, reported to have been made Feb. 20, 1953.

not a party. But, having been made a plaintiff against her will, she thereafter objected to the competence of the Court. This led to a British gambit: Italy, in view of her objection to competence, had not really turned to the Court within the time limit fixed by the Tripartite Agreement. The objective, obviously, of the British move was to leave the field entirely open for Her Majesty's Government to take over the Albania gold in satisfaction of its Corfu Channel claim, neatly eliminating both rival claimants. In all this legal jockeying the United States and France apparently took no part.

The decision of the Court may on its face seem another nicely reasoned piece of ineffectualness. The background of the case has been developed in this editorial to suggest: (1) that, in fact, the Court did, under unfavorable circumstances, accomplish a sort of equitable justice, and (2) that blame for the frustration the decision creates must lie elsewhere.

In a very real sense Britain, France and the United States were international fiduciaries of the looted monetary gold. It is somewhat disturbing to find these fiduciaries disposed in the twilight of their trust to enforce their own non-trustee claims against the trust assets, not against merely the "bad hat" cestui (Albania), but the other (Italy) as well.

Interesting questions of law remain open regarding the capacity under international law of Britain and the other two Tripartite Commission Powers effectively to agree that Albania's gold should, by their decision and without the initiation by Britain of any Court or Security Council¹⁷ action to enforce the prior judgment, be sequestered for its satisfaction. Certainly any likelihood at Paris in 1946 of any such self-help principle would have prevented agreement on Part III of the Paris Agreement on Reparation. It is from that Agreement and not from any claims based on the conquest of Germany that the three Occupying Powers seem to derive their authority. The fact that blocked gold deposits have been a factor in the negotiation of certain other claims settlements¹⁸ probably give us no legal precedent in any case, and certainly not for the instant situation.

When the position of Italy under the 1951 Tripartite Agreement is considered, moreover, not even the plea of lending effectiveness to the rule of law by aiding the enforcement of the judgments of the International Court appears to justify the agreement of the three Powers. Italy was envisaged as an eventual beneficiary of the gold pool under the Paris Agreement of 1946; subsequently she had her restitution claims against Germany safeguarded from waiver in the Peace Treaty.¹⁹ Eventually she became a participant in the gold pool. By their own action the three made themselves fiduciaries for Italy.

The effect of the Court's decision was to reject the British stratagem which would have opened the way for Britain to win against Italy either way the Albanian claim might be decided. It was necessary for the Court to develop the principle that under certain circumstances there is nothing

¹⁷ Under Charter, Art. 94.

¹⁸ As the U. S.-Yugoslav Nationalization Claims Settlement of July 19, 1948.

¹⁹ Treaty of Peace with Italy, T.I.A.S. No. 1648, Art. 77; this JOURNAL, Supp., Vol. 42 (1948), p. 75.

wrong, under Article 62 of the Rules of the Court, with a plaintiff's raising a legal issue of jurisdiction after having accepted jurisdiction. Some of the differentiations are thin, the reasoning embraces legal metaphysics;²⁰ but, sirs, what would you have under the circumstances?

Then the Court gives a gentle lesson in elemental due process; since Italy's claim turns on whether Albania has committed a legal wrong against Italy under international law, there is actually a dispute between Albania and Italy. Such a dispute could not be decided without the appearance of Albania.

The episode, on the whole, does not appear to be a happy one, mainly because the Court was cavalierly tossed a "hot potato" that diplomacy and international quasi-administrative law and international arbitration did not handle. The potato appears to have been tossed mainly to get rid of it, and the Court apparently has no choice but to field such tosses under Article 36.1 of its Statute. It is regrettable that it is so often assumed that the Court can settle anything—if only the parties will go to it. Such a proposition is surely not held for domestic courts; it is obviously not even remotely true internationally in today's world—certainly not true so long as the Court has no authority to command relevant sovereign parties to appear unless they have themselves consented to appear.

The Tripartite Gold Commission [or the governments behind it] should have found the facts and made the restitution award, for or against Albania, for or against Italy. That was what it was set up by international agreement in 1946 to do. The entirely distinct British claim against Albania should have been rigorously insulated from the restitution operation. The countries behind the Commission have failed to do their bit for the development of the international administrative law some have thought they have seen coming.²¹ They have unilaterally modified an international agreement under which they voluntarily assumed fiduciary obligations. They put the Court in a very difficult position and it is no thanks to them that it managed to do elemental justice at the price of not solving an international problem.

It would be interesting to know what finally happened to the gold.

COVEY T. OLIVER

THE INTERNATIONAL LAW COMMISSION'S 1954 REPORT ON THE REGIME
OF THE TERRITORIAL SEA

The International Law Commission decided in 1951 to initiate work on the "Régime of Territorial Waters." This action was taken pursuant to a resolution of the General Assembly at its Fourth Session on December 6, 1949. The initiative was taken by Iceland whose proposal was adopted by a slim margin.¹ Mr. J. P. A. François of The Netherlands was ap-

²⁰ Literally, as in American tax cases: What is real? What is sham? Refer to the report of the case, in this JOURNAL (cited above, note 1), pp. 652-653.

²¹ Cf. Rubin, "The Judicial Review Problem in the ITO," 63 *Harvard Law Review* (1949) 78.

¹ Liang, "Notes on Legal Questions Concerning the United Nations," this JOURNAL, Vol. 44 (1950), p. 533.

pointed Special *Rapporteur*—an excellent choice, since he served in a like capacity on the same topic for the Second Committee of the 1930 League of Nations Conference for the Codification of International Law, and is also the International Law Commission's Special *Rapporteur* on the High Seas. Mr. François presented a report to the Fourth Session of the International Law Commission.² After discussion in the Commission, revised reports were submitted.³ At its Sixth Session in 1954, the Commission considered the reports at six of its meetings and as a result included the topic in Chapter IV of its Report for that session.⁴ Its draft articles are to be submitted to governments in conformity with the provisions of the Commission's Statute.

It should be borne in mind that the International Law Commission still has on its agenda as a separate topic "The Regime of the High Seas," but clearly recognizes the connection between the two topics. The question of a "contiguous zone" and the problem of the continental shelf have been considered in connection with the high seas⁵ and the International Law Commission's views on these questions are not analyzed in this comment. It seems essential, however, that the two subjects of High Seas and Territorial Sea eventually be combined, since it is not likely that governments would act on any draft convention covering one of these projects apart from the other.⁶

The Report of the International Law Commission on the Regime of the Territorial Sea is in the usual form of a black-letter text followed by comments. The "Provisional Articles" are divided into three chapters: Chapter I, "General"; Chapter II, "Limits of the Territorial Sea"; Chapter III, "Rights of Passage."

Although the term "territorial waters" was first used by the Commission, it has now adopted, as the *Rapporteur* recommended, the term "territorial sea." The same choice was made in the League of Nations Committee's proposals in 1930. The choice is supported by the argument, *inter alia*, that the term "territorial waters" may include "internal [inland] waters," which causes confusion. It is noted that in French the term "mer territoriale" "has gained ground since 1930."

Article 1 properly describes the rights over the territorial sea as "sovereignty." In usual form, the article adds that "This sovereignty is exercised subject to the conditions prescribed in these regulations and other rules of international law." The distinction between sovereignty

² U.N. Doc. A/CN.4/53, April 4, 1952.

³ Second Report, U.N. Doc. A/CN.4/61, Feb. 19, 1953; Addendum to Second Report, U.N. Doc. A/CN.4/61, Add. 1, May 18, 1953; Third Report, U.N. Doc. A/CN.4/77, Feb. 4, 1954.

⁴ General Assembly, 9th Sess., Official Records, Supp. No. 9 (A/2693), 1954, pp. 12-21; this JOURNAL, Supp., Vol. 49 (1955), pp. 23-43.

⁵ See this JOURNAL, Vol. 45 (1951), p. 338; Vol. 46 (1952), p. 125; Vol. 48 (1954), p. 587.

⁶ *Semble contra* the United States view expressed in the Sixth Committee of the General Assembly, Nov. 29, 1954, and reproduced in Department of State Bulletin, Vol. 32 (1955), p. 62.

and its exercise is well put. Article 2 proceeds to state the established rule that this sovereignty extends "to the air space over the territorial sea as well as to its bed and subsoil." As a matter of drafting, Article 2 might well be made the second paragraph of Article 1, with the paragraph on the exercise of sovereignty added as the third paragraph to make clear that it is applicable to surface, airspace and subsurface. Its application to the superjacent airspace is of special importance.

Article 3 on the "Breadth of the territorial sea" is of course the heart of the matter. Understandably but regrettably, its drafting has been postponed. The Introduction to this Report explains that twelve different suggestions were made on this issue in the Commission's debates. Some members would set a uniform limit, but the limits of 3, 4, 6 and 12 miles all had their advocates. Some would prefer to say that the limit should "vary from State to State." Some would measure the breadth by that of the underlying continental shelf. Mr. François himself proposed a draft allowing each state to fix the breadth of its territorial sea up to a 12-mile maximum, but the Commission did not agree.⁷

Some of the views seem to cloud the distinction between the territorial sea over which the state has sovereignty, and the contiguous zone of the high sea within which the state may exercise certain rights. In his first and second reports to the Commission, the *Rapporteur* presented tables based on a "study of current legislation, as collected by the Secretariat and others."⁸ Sixty-seven states or subdivisions of states are listed in the first table. Such a table must be used with care. If one looks at the right-hand column one might get a superficial impression of utter chaos, since the figures do range from 3 to 200 miles.⁹ On analysis, however, one finds, for example, under "United States of America" "3 miles" and a sub-heading, "Customs—4 leagues." One finds hereunder also four States listed, including "Louisiana 27 miles" and "Florida 3 leagues." Actually one knows that the United States Government is firm and consistent in its support of the three-mile limit as the limit of territorial waters over which a state has sovereignty. The application of customs laws outside territorial waters in the "Contiguous Zone" rests on quite different principles. In the tidelands controversy, the Department of State was careful not to support wider maritime boundaries found in some State laws.¹⁰ Di-

⁷ Second Report, U.N. Doc. A/CN.4/61, Feb. 19, 1953, pp. 6 and 11.

⁸ U.N. Docs. A/CN.4/53, April 4, 1952, pp. 11-15; A/CN.4/61, Feb. 19, 1953, pp. 11-24.

⁹ The Icelandic Government has stressed the divergence thus indicated in "The Icelandic Efforts for Fisheries Conservation, Memorandum submitted to the Council of Europe by the Government of Iceland," September, 1954, p. 25.

¹⁰ Cf. statement by Jack B. Tate, Deputy Legal Adviser, Department of State, before the House Committee on Interior and Insular Affairs, March 3, 1953, Department of State Bulletin, Vol. 28 (1953), p. 486. Note, however, the blurring of the concepts of sovereignty and jurisdiction in Senate Report 2214 of Aug. 4, 1954, to accompany H.R. 9584 relative to the bill which became P.L. 680 of Aug. 27, 1954, 68 Stat. 883. The Swedish Government supplied corrections to the indications given of its claims; U.N. Doc. A/CN.4/71, Add. 1, May 13, 1953.

vergence of claims obviously exists among the nations of the world, and Mr. François is probably correct in saying that it would be impossible to get general ratification of a convention confirming the three-mile limit. It is still true that claims up to three miles are universally acknowledged to be valid under international law, while wider claims are not.¹¹ Although the International Court of Justice has revealed a liberal attitude in appraising a national claim to territorial waters in excess of three miles under special circumstances,¹² it is fantastic to assume that it would, for example, sustain the Peruvian claim to sovereignty over 200 miles of the Pacific Ocean as recently asserted in the case of the Onassis whaling ships.¹³ The difficulty of obtaining any agreement on the breadth of the territorial sea, even among the American Republics, has been apparent in the Inter-American Council of Jurists and the Inter-American Juridical Committee.¹⁴

States claiming broad expanses of high sea may well bear in mind that an assertion of sovereignty carries with it the assumption of duties as well as rights, even though the traditional problem of neutral duties is now unfashionable and perhaps legally moribund.¹⁵ On the other hand, adequate protection of legitimate national interests in fisheries, mineral rights, etc., in or under the high seas outside of territorial waters may be secured without extravagant claims to wide belts of maritime sovereignty.¹⁶ Mr. François in his first Report to the Commission has noted the divergence of views, both governmental and doctrinal. As a *Rapporteur* for the International Law Commission he is indeed in a dilemma. The present writer believes the solution will be found eventually when the problems are approached, whether globally or regionally, on the basis of the practical

¹¹ See statement of Senate Committee on Interstate and Foreign Commerce in Senate Report 2214 (cited in note 10). In presenting a claim to the Soviet Government for destruction of a B-50 off Cape Povorotny in 1953, the U. S. Department of State declared: "In the opinion of the United States Government there is no obligation under international law to recognize claims to territorial waters in excess of three miles from the coast." Department of State Bulletin, Vol. 31 (1954), p. 857, at p. 861.

¹² Anglo-Norwegian Fisheries Case, I.C.J. Reports, 1951, pp. 116-144; *cf.* this JOURNAL, Vol. 46 (1952), p. 348, and pp. 23-30.

¹³ New York Times, Nov. 16, 1954. *Cf.* Joint Declaration on the Maritime Zone by Chile, Ecuador and Peru, Aug. 18, 1952, *Revista Peruana de Derecho Internacional*, Vol. 14 (1954), p. 104.

¹⁴ *Cf.* this JOURNAL, Vol. 47 (1953), p. 701. See Inter-American Juridical Committee, Draft Convention on Territorial Waters and Related Questions (Department of International Law, Pan American Union, November, 1952), *passim*. By Res. XIX of May 8, 1953, the Inter-American Council of Jurists returned the subject to the Juridical Committee for further consideration. Mr. François' arrangement of his table by regional groups brings out the fact that no regional consensus is to be found; U.N. Doc. A/CN.4/61, Feb. 19, 1953, pp. 7 and 17-24.

¹⁵ It is notable that Mr. François does not hesitate to consider the possible applicability of neutral and belligerent rights and duties, although the Commission decided to deal only with rules in time of peace; see pp. 4 and 19 of the Report cited above in note 2.

¹⁶ *Cf.* the familiar proclamations of the United States in 1945; this JOURNAL, Supp., Vol. 40 (1946), pp. 45-48; Allen, "A New Concept for Fishery Treaties," this JOURNAL, Vol. 46 (1952), p. 319.

interests to be regulated, including fisheries of all types, sea-bed and subsoil deposits, and surface and aerial navigation. International organizations under the United Nations may need to be set up or existing organizations may be utilized. The preparatory work requires first, scientific investigation, and second, political negotiation and legal drafting. An encouraging step in this direction was taken by the United Nations General Assembly at its last session.¹⁷ International co-operation for conservation is by no means novel¹⁸ and could be expanded. A more difficult task is now being undertaken in the attempt to secure "international co-operation in developing and expanding the peaceful uses of atomic energy."¹⁹

Chapter II of the International Law Commission articles continues to deal with measurement problems. Here they naturally rely on the views of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* and on the recommendations of a group of geographic and hydrographic experts which met with the *Rapporteur* at The Hague in April, 1953.²⁰ The late S. Whittemore Boggs, the distinguished geographer of the United States Department of State for many years, was among the experts, and the method he advocated of measurements by means of a continuous series of arcs of circles is reflected in the proposals adopted by the Commission.²¹ The Commission proposes in Article 4 as the "normal base line" the traditional low-water line, but Article 5 would permit as an exception straight base lines as approved by the International Court of Justice in the *Anglo-Norwegian Fisheries Case*. The Court's views, however, have been modified by the Commission in accordance with recommendations of its experts as representing "a progressive development of international law."

The drafting of Article 7 on Bays is postponed pending agreement on Article 3.

Articles 8 and 9 cover ports and roadsteads. Permanent harbor works, including jetties and dikes, etc., are regarded as forming part of the coast. Roadsteads, wholly or partly outside the outer limit of the territorial sea, are included therein and are not to be treated as inland waters. The Commission considers that both of these articles reflect existing law.

Article 10 states the rule that "Every island has its own territorial

¹⁷ See discussion and text of resolution in Department of State Bulletin, Vol. 32 (1955), pp. 64-67.

¹⁸ Cf. Jessup, "L'Exploitation des Richesses de la Mer," Hague Academy, *Recueil des Cours*, Vol. 29 (1929), p. 405; Leonard, *International Regulation of Fisheries* (1944); Hayden, *International Protection of Wild Life* (1942).

¹⁹ See Department of State Bulletin, Vol. 31 (1954), p. 918, at p. 919.

²⁰ The list of the experts is printed in the Report (cited above, note 4), at p. 12. The report of the experts is an annex to U.N. Doc. A/CN.4/61, Add. 1, May 18, 1953.

²¹ Cf. Boggs, "Delimitation of Seaward Areas under National Jurisdiction," *THE JOURNAL*, Vol. 45 (1951), p. 240. The International Court of Justice in the *Norwegian Fisheries Case* stated that this method was not "obligatory by law." For an interesting discussion of specific measurement problems off the coasts of the United States, see Shalowitz, "Boundary Problems Raised by the Submerged Lands Act," *Columbia Law Review*, Vol. 54 (1954), p. 1021.

sea." For this purpose an island includes only areas permanently above high water and does not include, for example, a lighthouse built on a submerged rock or reef or technical installations such as those used to exploit oil in the continental shelf.²² On the other hand, "drying rocks or shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea." (Article 12.)

Articles 13 through 16 deal with particular problems of delimitation, *i.e.*, in straits (Article 13); at the mouth of a river (Article 14, postponed); between the coasts of two opposite states (Article 15); and of adjacent states (Article 16). In these situations the Commission took advantage of the suggestions of its group of experts without following them in every particular. The proposals are practical suggestions for solving problems and do not purport merely to reflect existing law.

Chapter III begins with an explanation of the meaning of the right of passage (Article 17). Although Article 18 proceeds to assert the recognized right of "*innocent passage*," this familiar term is not itself characterized but must be determined by implication. Following the 1930 Conference precedent, Article 17 first states what "passage" means, then devotes a paragraph to what passage is not innocent, and finally notes that passage includes incidental or necessary stopping and anchoring. The result of these three paragraphs seems to be that a vessel passing through territorial waters en route to or from a port of the coastal state is considered to be exercising a right of innocent passage. It is believed that the contrary view expressed in the Comment to Article 14 of the Harvard Research Draft on Territorial Waters is the correct one.²³ This was the view strongly stated by the United States delegate at the 1930 Hague Codification Conference and supported by Great Britain. Other delegates, however, such as those from Belgium, Norway, Germany and Japan, wished to include vessels en route to or from a port. The British delegate then modified his proposal to include vessels leaving a port for the high seas. The text finally recommended included passage to or from inland waters. However, as the Belgian delegate made clear, he and others were influenced by the desire to avoid being more restrictive than the 1923 Statute on the International Regime of Maritime Ports.²⁴ Access to ports should, however, properly be considered a topic separate from innocent passage. The jurisdictional rights of a coastal state are different in the two cases, exercise of jurisdiction over ships entering or leaving ports being in many instances reasonable or even necessary, while such exercise over a vessel in innocent passage could not be justified. The point is not

²² Such installations are dealt with in the Commission's draft articles on the Regime of the High Seas, especially Art. 6; see Report of the Commission on its Fifth Session (1953), A/2456, p. 12. Cf. Szasz, "May the United States Build Radar Platforms on its Continental Shelf?", *Cornell Law Quarterly*, Vol. 40 (1954), p. 110.

²³ This *JOURNAL*, Spec. Supp., Vol. 23 (1929), p. 295.

²⁴ See League of Nations, Acts of the Conference for the Codification of International Law, Meetings of the Committees, Vol. III, Minutes of the Second Committee, Territorial Waters, League Doc. C. 351 (b). M. 145(b). 1930. V., V. Legal. 1930. V. 16, pp. 58 ff. For the Statute on the International Regime of Maritime Ports, see Hudson, *International Legislation*, Vol. 2 (1931), p. 1162, at p. 1163.

discussed in the Comment on Article 17 of the International Law Commission draft or in the Report of the *Rapporteur* to the Commission. Either modification of the text or supporting argument in favor of the rule advocated is called for. The International Law Commission could clarify this and subsequent articles by devoting a separate article or section to "Access to Ports."

The Comment on Article 17 states:

This chapter applies only in time of peace; rights of passage in time of war are reserved.

No provision in this chapter is meant to affect the rights and obligations of members of the United Nations under the charter.

The Commission does not deal with the interesting question whether fishing vessels may enjoy the right of innocent passage, a subject which elicited divergent views at the Conference on United States-Ecuadorian Fishery Relations in 1953.²⁵

Article 19 is another interesting example of the way in which the International Court of Justice contributes to the clarification of international law, since the article is based on the judgment of the Court in the *Corfu Channel Case*.²⁶ It reads in part:

The Coastal State is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communications and not to allow the said sea to be used for acts contrary to the rights of other states.

Article 20, *de lege lata*, appropriately provides that the coastal state may take necessary steps of self-protection, but in the drafting, the first clause of paragraph 1 might well point up the applicability of this right to vessels in innocent passage. If the view expressed above about vessels bound for ports (or inland waters) were accepted, the second clause of this paragraph, which deals with such vessels, could be eliminated or shifted to a section on "Access to Ports." Paragraph 2 of this article permits the coastal state "temporarily and in definite areas of its territorial sea" to suspend the right of innocent passage. The Comment explains that this can be done only "in exceptional cases" and for "compelling reasons"; it may be questioned whether the text of the article adequately brings out these qualifications.

Article 21 correctly asserts the duty of vessels in passage to comply with appropriate laws and regulations of the coastal state. Article 22 also states existing law in respect to levying charges upon vessels in passage.

Articles 23 and 24 deal with the exercise of criminal and civil jurisdiction over vessels in passage, and take the sound view that the right to exercise such jurisdiction is limited. In regard to arrests and criminal investigations, the exceptions listed are the standard tests commonly mentioned in connection with ships in port, *i.e.*, if the consequences of the

²⁵ See the excellent discussion of this matter by Selak, in this JOURNAL, Vol. 48 (1954), p. 627. It seems probable that this issue had not been brought to the Commission's attention when its report was written.

²⁶ I.C.J. Reports, 1949, p. 4; this JOURNAL, Vol. 43 (1949), p. 558.

crime extend beyond the vessel, or the crime is of a kind to disturb the peace of the coastal state,²⁷ or if the assistance of local authorities is requested. Paragraph 2 of this article is open to question, since it reserves the right of the coastal state to deal with vessels "lying in its territorial sea, or passing through the territorial sea after leaving the inland waters." If, as it would seem, such vessels are not in innocent passage at all, the case should not be covered here. The expression "lying" does not seem to be the equivalent of "stopping and anchoring" which is permissible under Article 17, paragraph 3. Even under the Commission's view that vessels bound to or from inland waters are in innocent passage, the brief statement in the Comment is not a persuasive argument for making a distinction between a vessel exiting from, and a vessel about to enter, inland waters or ports, although it conforms to the British suggestion in 1930. The Comment notes that the Commission is not now dealing with problems of conflict of jurisdiction in criminal law or with collisions. It is indicated that at least the latter topic will be studied later.

Article 24 soundly takes the view opposite to the decision of the United States-Panama Claims Commission in the *David Case*²⁸ prohibiting enforcement in civil proceedings against a vessel in innocent passage or persons on board such a vessel. Query, whether it is desirable to include the exception which permits the arrest of the vessel in a civil action arising from a collision, or for salvage, or "in respect of obligations incurred for the purpose of the voyage" connected with the passage. Since such an action can follow the ship into other jurisdictions, the rights of claimants against the vessel would not be prejudiced if this exception were eliminated. The second paragraph of this article might well be eliminated or included elsewhere, since it deals with vessels which are not exercising the right of innocent passage, *i.e.*, vessels in inland waters, vessels "lying" in the territorial sea, and vessels exiting from inland waters. Again query the distinction between the last category and those about to enter inland waters.

Article 25 contains the salutary declaration in line with the Brussels Convention of 1926 that the articles apply to "Government vessels operated for commercial purposes."

Article 26 is more controversial. Although some members of the Commission disagreed, paragraph 1 accords the right of innocent passage to warships "without previous authorization or notification." The Comment contains one paragraph which is not clear:

The right of passage does not imply that warships are entitled, without special authorization, to stop or anchor in the territorial sea. The Commission did not consider it necessary to insert an express stipulation to this effect for Article 17, paragraph 3, applies equally to warships.

²⁷ The use of the word "country" in Art. 23, par. 1(b), instead of "coastal state" might be questioned.

²⁸ This JOURNAL, Vol. 28 (1934), p. 596. See comments by Borchard on this holding, *ibid.*, Vol. 29 (1935), p. 103.

But if this paragraph does apply—as it must in the stated cases of *force majeure* and distress—then the first sentence of the paragraph is in error. The article continues to specify the coastal state's right of regulation and the applicability of Article 20 (right to prohibit). Submarines must navigate on the surface. The fourth paragraph, prescribing the right of warships to pass through straits connecting parts of the high seas, is drafted in reliance on the International Court of Justice's judgment in the *Corfu Channel Case*.

Article 27, paragraph one, which states that warships are bound to respect the laws and regulations of the coastal state, seems redundant, since this duty naturally flows from the right of the coastal state to make such appropriate laws and regulations, as provided in paragraph 2 of Article 26. The second paragraph is sound in providing that, if the warship does not comply, it may be required to leave the territorial sea. Only this second paragraph was included in the *Rapporteur's* draft in his reports to the Commission.

As Professor Briggs has pointed out,²⁹ governments have not co-operated well in responding to requests for comments or information to assist the International Law Commission. In regard to the project on the territorial sea, governments were requested to reply only on the problem of "the delimitation of the territorial sea of two adjacent States." Sixty requests elicited only twelve replies, of which, Professor Briggs dryly notes, ten "contained information of value." One of the most important by-products of the League's codification effort was the compilation of data on state practices. Even though one is not sanguine that the International Law Commission can make much progress in actually codifying international law,³⁰ a relatively slight effort on the part of governments could contribute a like supplementary promotion of the rule of law. As has been pointed out, however, the International Law Commission's work will not be of enduring value if the United Nations does not reproduce its documentation in printed form. The present hard-to-get and perishable mimeographed documents imply an unjustifiable disparagement of the value of its work.

PHILIP C. JESSUP

PREPARATION FOR REVIEW OF THE CHARTER OF THE UNITED NATIONS

The Tenth General Assembly of the United Nations, in the fall of this year, will have to decide whether it shall summon a conference for review of the Charter of the United Nations. Article 110 provides this opportunity to take stock, after ten years of experience.¹ Various factors, such as the "cold war," the demand for economic development, and the rise of the anti-colonial majority, have shaped the course of the United Na-

²⁹ This JOURNAL, Vol. 48 (1954), p. 603.

³⁰ Cf. Charles de Visscher, *Théories et Réalités en Droit International Public* (1953), p. 181.

¹ See the editorial by P. B. Potter, in this JOURNAL, Vol. 48 (1954), p. 275.

tions in somewhat different directions from those originally planned, but the basic elements of the institution remain the same.

The Members of the United Nations appear to be uncertain whether they should call such a conference or not, and even more uncertain as to how it should be handled. There has been little definite antagonism to holding the conference, except from the Soviet bloc, which regards it as a conspiracy on the part of the United States to get rid of the principle of unanimity. Some Members, and a great many individuals scattered throughout the world, regard it as an opportunity for improvement of the United Nations; others feel, as Secretary Dulles expressed it, that there is a moral obligation, deriving from the San Francisco Conference, to provide an opportunity for reconsideration. It is probable that a conference of some kind will be held at some time; attention has thus far been concentrated on whether or how preparation should be made.

The considerations which moved delegates in the debate at the Eighth Assembly have been summarized in an earlier issue of the JOURNAL.² They hesitated to ask for preliminary suggestions or recommendations from governments, for fear that the positions taken would be maintained and frozen, so that the opportunity for later reconciliation of conflicting views would be reduced; they did not like the idea of a committee composed of representatives of governments, and thought that the Secretariat could do a better job of preparation. On the other hand, they were not willing to turn the Secretariat staff loose, and limited it to objective statement of the experience of the United Nations, without criticism or recommendation. Resolution 796 (VIII) called for preparation of a systematic compilation of the documents of the San Francisco Conference not yet published, with an index of all those documents; and for an indexed repertory of the practice of the United Nations organized by articles of the Charter. Two additional volumes of the United Nations Conference on International Organization have now been published, covering the Coordination Committee and the Committee of Jurists; and the index to these documents, done on an outside contract, has been finished.³

There are reasons for the uncertainty concerning the calling of the conference. If it were to be held and accomplish nothing—as now seems probable—would this cause serious dissatisfaction among some Members? The chief opponent of Charter revision is the Soviet Union; what is the United States prepared to offer in order to obtain Soviet consent to desired changes in the Charter? For that matter, what changes would the American people accept? Or other nations? Are they willing to submit to a stronger United Nations?

A great deal of advance could be accomplished without amending the Charter, if agreement could be had for such advance. If adequate and

² Yuen-li Liang, "Preparatory Work for a Possible Revision of the United Nations Charter," *ibid.*, pp. 83-97.

³ It should be noted that a repertory of Security Council practice was ordered in 1951, and this has now been issued as Doc. ST/PSCA/1 (Sales No. 1954. VII. 1). Apparently, another such study must be made under the resolution of the Eighth Assembly.

authoritative means of interpretation were accepted, much could be done through interpretation, as has happened with the Constitution of the United States. A few important usages seem to have been established, such as not counting an abstention as a veto; if agreement such as this could be obtained on other procedures, these might be put into practice likewise. If agreement of this sort is lacking, agreement to amend the Charter can hardly be anticipated. It would be possible also for those Members who were sufficiently interested to enter into supplementary agreements, supporting the Charter; *e.g.*, to submit to a certain vote in the Security Council for the settlement of their disputes, or to pledge in advance a certain supply of armed forces for use against an aggressor.⁴

A few proposals may be mentioned to illustrate the possibilities of Charter amendment. The usual complaint is against the veto, and one can feel sure that the Soviet Union would use its veto to block any amendment modifying the rule of unanimity. For that matter, the United States would be unwise to surrender it, in the face of the strong majority of small states which can now be lined up against her in the General Assembly and which could, in the absence of the veto, control the action of the Security Council.⁵ The suggestion that the use of the veto be modified in practice, for settlement of disputes and for admission of new Members, is a more feasible one; but for this, no amendment of the Charter is required.

Weighted representation has been proposed as a substitute for the veto, and this might furnish a more satisfactory distribution of voting power in the General Assembly. Amendment of the Charter would be needed for this change, and it would in all probability be unobtainable. It is inconceivable that the stronger Powers would agree to representation based upon population. Perhaps some formula combining various elements could be devised, but it is almost as inconceivable that the smaller states—forty-three of which pay each less than one percent of the budget—would give up “sovereign equality” for any form of weighted representation.

There are many who are eager for an international police force; the technical problems involved alone would make its realization very doubtful; and the response of states would probably be discouraging. Doubtless the voluntary response of states shown in their contribution of armed forces for use against aggression in Korea is encouraging, but it was not a magnificent response; nor was the response to the inquiry of the Collective Measures Committee concerning pledging of forces for future use. However, assuming that nations would be willing to maintain—and to submit to—an international police force, no amendment of the Charter

⁴ For example, the so-called Thomas-Douglas resolution, S. Con. Res. 52, 81st Cong., 1st Sess.

⁵ This majority can only recommend, of course; and its present composition and course of action lead to the reflection that, in the present voting arrangement in the Assembly, no greater power than that of recommendation would be granted to the Assembly as part of Charter revision.

would be necessary; there is nothing in the present Charter which forbids its establishment.

Compulsory jurisdiction over disputes would also be desirable. Perhaps we are nearer to this than to any other improvement, insofar as it refers to the compulsory jurisdiction of the International Court of Justice over disputes of a legal character. However, there are barely thirty states which are now bound under the Optional Clause. Again, no amendment would be needed to give the Court compulsory jurisdiction; all that is needed is for Members to accept the Optional Clause, and without reservations. It is asking a good deal more to give the Security Council authority to impose a settlement between disputants by political vote. This would require amendment of the Charter—except for those who might be willing by supplementary agreement to submit to such decisions; it would probably also require disuse of the veto, and it would raise questions as to the ability of the Security Council to enforce such settlements.

Without seeking further for illustrations, it would appear that we are now in the following dilemma: If there were enough agreement to obtain amendment of the Charter, most of the desired changes could, under the present liberal interpretation of the Charter, be achieved without necessity for amendment; and if there is not enough agreement among Members to take such steps as are now possible, what chance is there to amend the Charter?

This statement of the dilemma pushes the problem back to the attitudes of Members, to the actual support which they now give to the Charter, to the sincerity of their desires to reach agreements in the community interest. Thus far, they have shown little self-discipline in this regard, little respect for the Charter. They call upon the Court to interpret the Charter only when they are frustrated; each organ, and each Member, reserves the right to interpret the Charter as it wishes on each occasion separately—and often inconsistently. Those who made the Charter provided no authoritative manner in which to interpret it; and, while it is claimed that each organ may decide for itself, there have been very few cases in which the Assembly or its committees have formally voted upon a challenge to competence—even though Rules 80 and 110 of the General Assembly assert that when a challenge to competence is raised, it must be voted upon immediately. What usually happens is that an action is voted, and it is then claimed that the vote for that action proves that the organ thinks it is competent to take the action. In the very few cases on which a vote as to competence was taken as to Article 2 (7), the domestic questions clause, it will be found that competence was upheld by the anti-colonial majority on matters which interested them, such as the treatment of Indians in South Africa or the right of the United Nations to pass upon the status of non-self-governing territories; and that where competence was denied, it was upon matters proposed by the Soviet Union.

In the ten years of its operation the United Nations has tended more and more to become a political machinery and less and less a legal order. This is perhaps natural in so disorderly a world, and in an institution in

which there is a majority of smaller states who are naturally little interested in upholding the vested rights of the larger Powers under the old international law.⁶ This majority can and does use its voting power to override the restrictions set in the Charter. The Report of the Commission on the Racial Situation in the Union of South Africa, in the only study made by the United Nations of the domestic questions clause, maintained that interpretation is a political matter, and noted that no question of interpretation in this connection had been referred to the International Court of Justice.⁷

This trend should be of interest to international lawyers who, it is to be supposed, are interested in the maintenance of an international legal order.

If Members do not pay respect to the present Charter, can it be expected that they would pay respect to a revised and stronger Charter? Or that they would support revision toward a stronger Charter? Any strengthening of the Charter must be based upon law, for the Charter is both a constitution and a treaty; but in the United Nations today, legal procedures and constitutional restrictions arouse no enthusiasm. The temper of the times does not favor legal order and, therefore, does not favor Charter revision.

Nevertheless, a conference for review of the Charter may be useful. It might serve to give more understanding to peoples, who desire international peace and security and who think that this must be based upon law, of what is really needed for strengthening the United Nations, and what price must be paid for it. Even though risky, the conference might be worth while for its educational value.

In any case, more preparatory work is needed than is now planned. Much more study is being made by unofficial bodies than by the United Nations, and the proposals made by such bodies need to be considered carefully by United Nations experts, and in advance of a conference. Such a study could well occupy a year or so before a conference meets, and the Assembly might, if and when it decides to hold a review conference, postpone its meeting for a year or so in order to allow adequate study to be made of the changes which are needed and the extent to which, from a practical viewpoint of possibility of adoption, it is worth while to spend time upon them. Such a study might result in a limited agenda, so that the conference would not be used for vain proposals, for propaganda and for long-winded oratory. The Secretariat is best equipped for such a study; the experience of committees of representatives for such a purpose has not, as the delegate of the United Kingdom remarked, been encouraging.⁸ Thus far the Assembly has not permitted the Secretariat to make such a study; if it cannot be trusted for the purpose, the task could be

⁶ This, of course, brings into prominence, among needed improvements, the procedure by which new international law can be made. Though this raises the whole question of peaceful change, little attention has been paid to the question.

⁷ U. N. General Assembly, 8th Sess., Official Records, Supp. No. 16 (A/2505), p. 22.

⁸ U.N. General Assembly, 8th Sess., Official Records, Sixth Committee, p. 67 (Vallat).

turned over to the International Law Commission or, since its time is well taken, to an outside body of experts. It is such a group which should make the preliminary study; the representatives of governments who, of course have the final decision, would find their work eased and accelerated by such an objective study.

CLYDE EAGLETON

MEMBERSHIP AND REPRESENTATION IN THE UNITED NATIONS

The questions of membership and representation in the United Nations have been present in the minds of students and friends of that institution from the time of its inception onward, as is, or was, quite natural. The distinction between the two phases of the problem has not always been borne in mind, but has been raised to prominence and accentuated by the case of Communist China, without being entirely novel.

The distinction mentioned is in some ways nothing but the old distinction between the existence of a state and the existence of a government, or their recognition. This distinction was not mentioned in the United Nations Charter and the "Republic of China" was made a Member of the Organization and given permanent representation on the Security Council. At the moment this seemed sufficient for the purpose.

We are not considering here, it should be noted, membership or representation in the Specialized Agencies of the United Nations. Each of these has its special conditions of membership or representation and/or may modify these conditions at will. An attempt by the United Nations to control membership in one of the Specialized Agencies on political grounds did not enjoy great success. At all events the problem here is not nearly as serious as it is in the case of the United Nations itself.

There has arisen, as is well known, the problem of admitting or not admitting certain states, as states, to membership in the United Nations. On this issue Russia and the United States, to put the matter bluntly, have disagreed sharply. As a result fifteen or twenty states have been denied membership in the United Nations in spite of various efforts at compromise and agreement, mainly promoted by the United States. It hardly needs to be added that the crucial element in these cases has been and is the character (Communist or non-Communist) of the governments in those countries.

When we come to Communist China, however, the difficulties multiply, partly due to the attitudes of other countries, especially Russia and India. In the cases of most other countries eligible for membership, no great amount of propaganda or promotion has been undertaken, at least by the countries themselves. In the case of Red China, on the other hand, the issue has become a feud, if not a *casus belli*. And the issue has not yet been decided.

It will be remembered that a few years ago the International Court of Justice was asked for its opinion on the propriety of states Members of the United Nations taking into account factors other than those specifically mentioned in the Charter as qualifications for membership, qualifications

of a very general or even vague character.¹ The Court quite naturally returned a negative reply to such a query, although every judge must have known that such a reply meant little or nothing and that states or governments would in fact have in mind political considerations in all cases.

This is obviously no place in which to discuss the purely political aspects of the problem of the recognition of the present government in Peiping as the representative of "the Republic of China"—to state the matter with painful precision and in terms of the Charter. There might be advantages and disadvantages to be anticipated along that line, but weighing the considerations for and against such action would require more time and space than are available here. The question inevitably arises in connection with approval of credentials of delegates to United Nations organs.² The answer obviously turns in part on the value of having in the United Nations, rather than outside it, a country believed to be hostile to United Nations principles. The case is made all the more difficult by the activities of the Peiping government in Korea, not to mention the Formosa area.

The conclusion to such an analysis appears to be fairly simple, at least from a juridical viewpoint. The Members of the United Nations are entirely free to decide upon recognition of the Communist government of China as the representative thereof in accordance with the terms of the Charter, the facts as they see them, and their own policies. The international community and the United Nations might benefit or suffer more or less from such action. The Members of the United Nations are also entirely free to refuse to admit "Red China" to the United Nations—so to speak—with possible similar results.

PITMAN B. POTTER

THE MEETING OF CONSULTATION OF FOREIGN MINISTERS AS A PROCEDURE OF INTER-AMERICAN COLLECTIVE SECURITY

Important as was the progress made in the inter-American procedure of arbitration from the time of the proposed "Plan of Arbitration" of 1890, it was not until the establishment of the inter-American regional security system that it was possible to contemplate a treaty of pacific settlement which would be all-inclusive in its scope. The well-known inter-American treaties of 1929, dealing respectively with conciliation and arbitration, both had their loopholes of escape, the conciliation convention carrying the usual provision that the report of the commission was not to be binding upon the parties and the arbitration treaty making exception of non-judicial questions, more specifically, questions "which are within the domestic jurisdiction of any of the Parties to the dispute and are not controlled by international law."

With the adoption of the Treaty of Reciprocal Assistance at Rio de Janeiro in 1947 it appeared possible to formulate an all-inclusive treaty of

¹ International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1948, p. 57; this JOURNAL, Vol. 42 (1948), p. 927.

² Rules of Procedure of the Security Council, Rule 15.

pacific settlement; and, on the basis of a draft presented by the Inter-American Juridical Committee, the American Treaty on Pacific Settlement was signed at the Conference at Bogotá in 1948, dealing successively with good offices and mediation, investigation and conciliation, judicial procedure before the International Court of Justice, and arbitration. But what of disputes involving a threat to the peace, in which prompt action is needed to avert hostilities? These obviously were outside the scope of the Pact of Bogotá, simply because they represented a breakdown of the provisions of pacific settlement.

For disputes of this latter character provision was made in the Treaty of Reciprocal Assistance that a Meeting of Consultation of Foreign Ministers should be held. But this is a difficult procedure, in the sense that it involves bringing together the Ministers of State from the four quarters of the Hemisphere, as well as travel by air if the meeting is to be held promptly. In consequence the Rio Treaty made provision that the Council of the Organization, consisting of twenty-one representatives permanently in Washington, should be able to act provisionally as the Organ of Consultation. Thus, instead of conferring upon the Council of the Organization a jurisdiction in such cases corresponding to that of the Security Council of the United Nations, the Rio Treaty makes it necessary to summon a meeting of the Foreign Ministers and gives to the Council only a provisional competence pending the meeting of the Foreign Ministers.

In this case as in others the line of least resistance has been followed. On December 14, 1948, the Council, at the request of the Government of Costa Rica, called a Meeting of Consultation to hear the complaint of that state that it was being invaded by troops from Nicaragua. But the Council failed to fix a date for the Meeting of Consultation; so that after it had acted provisionally as Organ of Consultation for some two months and had made, through its own committee, the necessary investigations, a Pact of Amity was signed between the two states the following February 21, and the Meeting of Consultation was called off. Again, on January 6, 1950, the Council, at the request of the two governments involved, Haiti and the Dominican Republic, called a Meeting of Foreign Ministers but, as in the Costa Rican case, failed to fix a date for the meeting, with the result that the Council, acting in its provisional capacity, was able to settle the controversy and then cancel the Meeting of Consultation.

In the more recent case of the request of Costa Rica, under date of January 8, 1955, for the call of a Meeting of Consultation on the ground that its independence was seriously threatened by acts of the Government of Nicaragua, the Council deferred its decision for twenty-four hours, and then, upon receipt of news of a *de facto* invasion of the country, called an earlier session and decided to summon the Meeting of Consultation without further delay. As in previous cases, the Council failed to fix a date for the Meeting of Consultation; and, in the exercise of its competence to act provisionally as the Organ of Consultation, it proceeded to appoint a Committee of Investigation to proceed to the two countries and

report upon the facts. The resolution of the Council further requested the two governments to pledge themselves to refrain from the commission of any act which might aggravate the situation.

The following day, January 12, the Council, meeting at the urgent request of the representative of Costa Rica and hearing from him that the capital, San José, and other cities had been bombed by the insurgents, took a step which, although ostensibly no more than a measure to make the work of the Investigating Committee more effective, actually had the character of an exercise of police power. The Council requested the governments, who were in a position to do so, to place at the disposal of the Investigating Committee aircraft which, in the name of the Committee and under its supervision, might make pacific observation flights over the regions affected, after receiving the consent of the governments whose territories were traversed. The fact that the flights were described as "pacific" could not prevent them from becoming *in fact* a deterrent to the invading forces; but at the same time it prevented any criticism of the measure as being "enforcement action" which would have required the consent of the Security Council of the United Nations under Article 53 of the Charter.

On January 16, 1955, at the request of the Council directed to the governments of the member states, the United States sold four airplanes to the Government of Costa Rica. This might have been done by the United States upon its own initiative without violation of the Havana Convention of 1928, inasmuch as the belligerency of the rebels had not been recognized. But the United States preferred to act in accordance with a request of the Council, lest its act be interpreted as intervention in the case. Subsequently, in view of the complaint of the Government of Nicaragua that its territory was being violated by Costa Rican planes in pursuit of the rebels, the Investigating Committee established security zones on either side of the boundary, and at the same time appointed military observers to keep in touch with the points along the boundary at which supplies might be furnished to the insurgents.

The Investigating Committee presented its report to the Council on February 18, surveying its activities both in Costa Rica and Nicaragua and the sources from which the conclusions reached in the report were drawn. The Committee found that there had been foreign intervention in respect to equipment and transportation of the invading forces, that a substantial number of them had entered Costa Rica across the Nicaraguan frontier, that aircraft "proceeding from abroad" had dropped arms and ammunition at predetermined points and had made flights in which they bombed and machine-gunned Costa Rican towns, including the capital, San José, that in consequence there had been violation of the territorial integrity, sovereignty, and political independence of Costa Rica, and that while a large majority of the attacking forces were of Costa Rican nationality, that nevertheless did not in any way alter the character of the acts of intervention of which Costa Rica had been the victim.

These facts found, the Investigating Committee recommended that the Pact of Amity signed by Costa Rica and Nicaragua in 1949 be improved

and strengthened; that a special bilateral treaty be signed looking to the more effective application of the Habana Convention on the Duties and Rights of States in the Event of Civil Strife; and that a bilateral Commission of Investigation and Conciliation under the terms of the Pact of Bogotá be appointed to serve as a permanent guarantee of the settlement of any future difficulties. The Ecuadoran member of the Committee entered a reservation stating that, while in general agreement with the report, he considered that it was incomplete in that it failed to identify the author or authors of the "foreign intervention," and stating further that there should be an early Meeting of Ministers of Foreign Affairs to consider the possibility of establishing an Inter-American Police Force and the improvement of the system for the control of the traffic in arms and ammunition and for the limitation of armaments within the requirements of hemisphere defense.

On February 24, the Council of the Organization of American States, still acting provisionally as Organ of Consultation, met to discuss the report of its Committee and at the close of a long session adopted four separate resolutions: the first declaring that its resolution of January 14 had condemned the acts of intervention of which Costa Rica had been the victim and that the favorable outcome of the situation had rendered unnecessary the additional measures provided in the Treaty of Reciprocal Assistance, and further expressing its deep concern over the acts in question and its earnest desire that they should not be repeated and at the same time its satisfaction that the sovereignty and independence of Costa Rica had been preserved in consequence of the measures taken by the Organization; the second resolution calling upon the Governments of Costa Rica and Nicaragua to implement the provisions of the Pact of Bogotá of 1948 by creating the Commission of Investigation and Conciliation provided for in the treaty and at the same time to enter into the bilateral agreement contemplated in their Pact of Amity of 1949 for the better supervision and control of their respective frontiers in respect to the illegal activities of exiles and the traffic in arms; and the third resolution proclaiming the termination of the activities of the Investigating Committee, but at the same time creating a Special Commission of the Council to co-operate with the representatives of Costa Rica and Nicaragua in carrying out the provisions of the second resolution and to continue the functions of the military observers as long as would appear to be necessary; and a last resolution of thanks for services rendered.

The successful conclusion of the case would seem to suggest that the provisional powers of the Council of the Organization of American States are adequate to serve as a procedure of summary jurisdiction in specific situations not admitting of delay, reserving perhaps to the Meeting of Consultation of Foreign Ministers questions of principle in respect to which decisions can be taken of a constructive character looking to the avoidance of future difficulties, in line more or less with the proposal made by the Ecuadoran member of the Investigating Committee in his dissenting opinion.

C. G. FENWICK

NOTES AND COMMENTS

FORTY-NINTH ANNUAL MEETING OF THE SOCIETY
APRIL 28-30, 1955

SHERATON-CARLTON HOTEL, WASHINGTON, D. C.

ADVANCE PROGRAM

THURSDAY, APRIL 28, 1955

7:00 p.m.

Registration for members.

8:15 p.m.

Address by Dr. Philip C. Jessup, President of the Society.
Prepared comments by Panel Chairmen will follow.

FRIDAY, APRIL 29, 1955

9:30 a.m.

Panel I: *Recent Developments in Regional Organization*
Chairman: Professor Herbert W. Briggs, *Cornell University*
Speaker, commentators and *rapporteur* to be announced.

2:30 p.m.

Panel II: *Practice and Procedure before International Claims Commissions, including General Principles and Techniques of Effective Presentation of Claims*

Chairman: Louis B. Wehle, *of the New York Bar*
Speaker: Dudley B. Bonsal, *Curtis, Mallet-Prevost, Colt and Mosle*
Commentators and *rapporteur* to be announced.

5:30 p.m.

COCKTAIL PARTY

For members, their wives and husbands, to meet the President, speakers and Executive Council.

8:15 p.m.

Panel III: *International Law and Current Problems in the Far East*
Chairman: Jack B. Tate, *Yale University*
Speaker: Arthur H. Dean, *Sullivan and Cromwell*
Commentators and *rapporteur* to be announced.

SATURDAY, APRIL 30, 1955

10:00 a.m.

BUSINESS MEETING

Report of Committee on Legal Problems of the United Nations.
Other committee reports.
Election of officers.
Meeting of Executive Council.

ANNUAL DINNER

Presiding: The President of the Society.

Subject: *Peaceful Uses of the Atom*

Addresses by His Excellency Sir Leslie Knox Munro, Ambassador of New Zealand; and the Honorable Morehead Patterson.

NOTE: As announced in the July, 1954, JOURNAL, a registration fee of \$1.00 will be required of all members attending the annual meeting, except students. The fee is payable in advance as indicated in the registration and dinner reservation cards already distributed to the members.

The cocktail party to be held on Friday afternoon, April 29, will take place in the lobby immediately adjoining the meeting room, and refreshments will be served on a "cash and carry basis."

E. H. F.

THE TRIESTE SETTLEMENT AND HUMAN RIGHTS

The "Memorandum of Understanding between the Governments of Italy, the United Kingdom, the United States and Yugoslavia regarding the Free Territory of Trieste," initialed in London on October 5, 1954,¹ contains "practical arrangements" on which the four governments have agreed "to bring the present unsatisfactory situation [in the Free Territory of Trieste] to an end." The Memorandum of Understanding does not purport to amend formally the terms of the Italian Peace Treaty of February 10, 1947. The "practical arrangements" for which it provides consist in the termination by the governments of the United Kingdom and of the United States, on the one hand, and Yugoslavia, on the other, of military government in Zones A and B of the Territory and their replacement by Italian and Yugoslav civil administrations. The new boundary between the areas under Italian and Yugoslav civil administration, respectively, is identical with the boundary between the British-American Zone A and the Yugoslav Zone B, with an adjustment in favor of the latter. The agreement does not expressly provide for the acquisition of sovereignty by Italy and Yugoslavia over the two areas nor does it contain provisions which would effect a change in the nationality status of the population. The four governments communicated their agreement to the Security Council of the United Nations. With reference to this communication, the representative of the Soviet Union informed the members of the Security Council on October 12, 1954, that the Soviet Government takes cognizance of the agreement.² Annexed to the Memorandum of Understanding of the four Powers, there is a "Special Statute" which the Italian and Yugoslav governments have agreed to enforce. It is the purpose of the Special Statute to implement "the common intention of the Italian and Yugoslav Governments to ensure human rights and fundamental freedoms without discrimination of

¹ U.N. Doc. S/3301; Dept. of State Bulletin, Vol. 31 (1954), p. 556; New York Times, Oct. 6, 1954.

² U.N. Doc. S/3305.

race, sex, language and religion in the areas coming under their administration" under the terms of the Memorandum of Understanding.

*Human Rights Provisions Other than the "Special Statute"
to which Italy and Yugoslavia are Parties*

Before proceeding with the examination of the provisions contained in the Special Statute, the present note will review the obligations in the field of human rights which the Italian and Yugoslav governments have undertaken by previous international instruments apart from this Special Statute.

Article 15 of the Peace Treaty with Italy of February 10, 1947, provides that

Italy shall take all measures necessary to secure to all persons under Italian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.³

The Peace Treaty speaks of "persons under Italian jurisdiction." While the Memorandum of Understanding has not expressly transferred to Italy the sovereignty of the northern area of the Free Territory, its population has, through the extension of Italian civil administration over the area, become a population under Italian jurisdiction, and it appears, therefore, that the Peace Treaty protects that population.⁴ On May 9, 1952, the governments of the United States, United Kingdom and Italy, in an understanding on the administration of Zone A of the Free Territory of Trieste, provided that administrative arrangements for the zone should be of such a nature as "to continue to ensure to all inhabitants of the zone the enjoyment of human rights and fundamental freedoms without distinctions as to race, sex, language or religion."⁵

Yugoslavia, as a state to which Italian territory has been transferred by the Peace Treaty, is obligated by Article 19(4) of the treaty to secure, "in accordance with its fundamental laws,"⁶ to all persons within the transferred territory without distinction as to race, sex, language or religion, the enjoyment of human rights and of fundamental freedoms. Opinions may differ on the question of whether this provision was, or is now, applicable in the area of the Free Territory coming under Yugoslav civil administration. The Free Territory was not "territory transferred

³ This JOURNAL, Supp., Vol. 42 (1948), p. 54.

⁴ Italy has also signed but not yet ratified the European Convention on Human Rights, adopted in Rome on Nov. 4, 1950. In addition, in the agreement with Austria of Sept. 5, 1946, Italy has undertaken certain obligations for the protection of its German-speaking minority in the Bolzano Province and in the neighboring bilingual townships of the Trento Province (Art. 10(2) and Annex IV of the Italian Peace Treaty).

⁵ Dept. of State Bulletin, Vol. 26 (1952), p. 779; United Nations Yearbook on Human Rights for 1952, p. 306 (note prepared by the U. S. Government).

⁶ The qualification "in accordance with its fundamental laws" does not apply in the case of the obligation of Italy under Art. 15 of the Peace Treaty.

to a State" within the meaning of Article 19(4) of the Peace Treaty, and Article 21(4) provides expressly that the Free Territory shall not be considered as "ceded territory" within the meaning of Article 19. The Permanent Statute of the Free Territory of Trieste⁷ contained in its Articles 4, 5, 6, 12, 15 and 20 a series of provisions designed to ensure respect for human rights and fundamental freedoms in the Free Territory. It has, however, never come into force. Yugoslavia is a Member of the United Nations, a party to the Charter of the United Nations, including its human rights provisions.

The "Special Statute" and the Universal Declaration of Human Rights

In Article 1 of the Special Statute the contracting parties undertake that

in the administration of their respective areas, the Italian and Yugoslav authorities shall act in accordance with the principles of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948 so that all inhabitants of the two areas without discrimination may fully enjoy the fundamental rights and freedoms laid down in the aforesaid Declaration.

The wording of this provision is strengthened by a phrase in Article 2(a) where reference is made to "political and civil rights as well as other human rights and fundamental freedoms" which it is stated are "guaranteed by Article 1."

The Universal Declaration of Human Rights, whatever its legal status, has, since its proclamation by the General Assembly in 1948, been used as a yardstick for the measurement of standards of respect for human rights in numerous recommendations and resolutions of the General Assembly and other organs of the United Nations, of the Council of Europe, and of the Organization of American States. Its provisions are reflected in recent national constitutions and legislation. It has repeatedly been referred to and invoked in preambles of international conventions. Examples are the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 4, 1950, the Geneva Convention relating to the Status of Refugees of July 28, 1951, the Peace Treaty with Japan signed at San Francisco on September 8, 1951, the Convention on the Political Rights of Women of December 20, 1952, and the New York Convention on the Status of Stateless Persons of September 28, 1954. In the Trusteeship Agreement for Somaliland,⁸ Italy undertook to administer the territory in accordance with, *inter alia*, a provision by which she accepted the Universal Declaration of Human Rights as a standard of achievement. The Special Statute on Trieste is, however, the first international legal instrument which makes the Universal Declaration of Human Rights part of its immediately applicable operative provisions.

Upon Article 1 of the Special Statute, which transforms the provisions of the Universal Declaration of Human Rights into the local law of the

⁷ Annex VI to the Italian Peace Treaty.

⁸ U.N. Doc. A/1294, approved by the General Assembly on Dec. 2, 1950 (Res. 442 (V)); annex: Declaration of Constitutional Principles, Art. 10.

two areas, there follows a series of provisions which either apply the rules of the Universal Declaration in a concrete way to the local situation of the two areas or go beyond the Declaration.

For the purpose of presenting these more specific provisions of the "Special Statute," it might be useful to recall a decision on terminology adopted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities at its first session in 1947.⁹ The Sub-Commission distinguished between "prevention of discrimination" and "protection of minorities."¹⁰ It explained the term "prevention of discrimination" as "the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish." With regard to the term "protection of minorities," the Sub-Commission stated that it was

the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.

The Universal Declaration of Human Rights does not contain provisions on the "protection of minorities" in this sense. When adopting the Declaration, which is permeated by provisions deprecating discrimination, the General Assembly stated¹¹ that it was difficult to adopt a uniform solution for the complex and delicate question of the protection of minorities, which has special aspects in each state in which it arises, and decided not to deal in a specific provision with the question of minorities in the text of the Declaration. It ordered, however, "a thorough study of the problem of minorities" by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. One result of these studies, which are still continuing, is the insertion in the draft Covenant on Civil and Political Rights¹² of a provision (Article 25) which provides:

In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

There is, however, no hard and fast distinction between the "prevention of discrimination" and the "protection of minorities." They are, as the Permanent Court of International Justice has stated,¹³ "indeed closely interlocked."

⁹ Economic and Social Council, Official Records, 6th Sess., Supp. No. 11, Doc. E/CN.4/52.

¹⁰ See Kunz, "The Present Status of the International Law for the Protection of Minorities," this JOURNAL, Vol. 48 (1954), p. 282.

¹¹ Res. 217 C (III), Dec. 10, 1948.

¹² Report of 10th Session of Commission on Human Rights, Economic and Social Council, Official Records, 18th Sess., Supp. No. 7, Doc. E/2573, Annex I.

¹³ Minority Schools in Albania, Advisory Opinion of April 6, 1935, Series A/B, No. 64, p. 17.

The provisions of the Special Statute are arranged on the basis of the distinction between the safeguarding of equality (prevention of discrimination) and the positive protection of minorities. The word "minority" is not used, but the terms "the Yugoslav ethnic group in the Italian administered area" and "the Italian ethnic group in the Yugoslav administered area" are employed. The Special Statute, however, also demonstrates the "interlocking" of the two ideas.

Equality and Non-Discrimination (Article 2)

Article 2 of the Special Statute provides in general that the members of the Yugoslav ethnic group in the area administered by Italy and the members of the Italian ethnic group in the area administered by Yugoslavia shall enjoy equality of rights and treatment with the other inhabitants of the two areas. Paragraphs (a) to (f) of Article 2 explain what "this equality" implies.

Paragraph (a) provides for equality with other citizens regarding political and civil rights as well as other human rights and fundamental freedoms "guaranteed by Article 1." While the general introductory provision of Article 2 speaks of "equality with the other inhabitants," paragraph (a) provides for equality with "other citizens." The "other rights" (*i.e.*, other than political and civil) are apparently what have become known as economic, social and cultural rights. They are set forth in Articles 22 to 28 of the Universal Declaration of Human Rights.

Paragraph (b) stipulates equal rights in acquiring or performing any public services, functions, professions and honors, and paragraph (c), equality of access to public and administrative office. This is an elaboration and adaptation to the situation in the territory, particularly of Article 21(2) of the Universal Declaration, which provides that "everyone has the right of equal access to public service in his country." Paragraph (c) further provides that in this regard the Italian and Yugoslav administrations will be guided by the principle of facilitating for the Yugoslav ethnic group and for the Italian ethnic group, respectively, under their administration a fair representation in administrative positions, and especially in those fields, such as the inspectorate of schools, where the interests of such inhabitants are particularly involved.

Paragraph (d) provides for equality of treatment in following trades or professions in agriculture, commerce, industry or any other field, and in organizing and operating economic associations and organizations for this purpose. Equality of treatment shall also apply with regard to taxation. Article 6 of the Special Statute is the counterpart of this economic equality provision in the area of the protection of the two ethnic groups as such. It provides that the economic development of the two protected groups shall be secured without discrimination and with a fair distribution of the available financial means. In order to prevent the changes in the civil administration of the two areas from interfering unduly with the economic life of the inhabitants, special safeguards for persons now en-

gaged in trades or professions are provided. Those among them who do not possess the requisite diploma or certificate for carrying on a trade or profession shall have four years from October 5, 1954, within which to acquire the necessary diploma or certificate. The "requisite" or "necessary" diploma or certificate is apparently a diploma or certificate required or necessary under the law of the new administering authority. During the four years the occupations and professions concerned can be carried on.

Paragraph (f) expressly mentions equality with other citizens in the general field of social assistance and pensions.

Safeguards for the Ethnic Character and the Unhampered Cultural Development of Both Ethnic Groups (Articles 4 to 6)

Article 4 of the Special Statute purports to safeguard to the Yugoslav ethnic group in the Italian-administered area and to the Italian ethnic group in the Yugoslav-administered area more than equality with the dominant group. The right of these groups to their own press in their mother tongue (paragraph (a)) could be claimed to be set forth in Article 19 of the Universal Declaration, which proclaims everybody's right to freedom of opinion and expression which includes the right "to seek, receive and impart information and ideas through any media."

That the educational, cultural, social and sports organizations of both groups shall be free to function in accordance with the existing laws (paragraph (b)) again does not seem to go beyond the right of everyone to freedom of peaceful assembly and association as set forth in Article 20 of the Universal Declaration. But the Special Statute also provides that "such organizations shall be granted the same treatment as those accorded to other corresponding organizations in their respective areas, especially as regards the use of public buildings and radio and assistance from public financial means." This, of course, is a typical minorities protection clause providing as it does for positive assistance to the protected ethnic group.

Paragraph (c) of Article 4 contains the provisions which are the main concern of every system of protecting ethnical and linguistic minorities or groups: the provisions on schools. "Kindergarten, primary, secondary and professional school teaching in the mother tongue shall be accorded to both groups." It will be seen that not only the teaching of the mother tongue, but teaching *in* the mother tongue, as the language of instruction, is safeguarded. The Universal Declaration of Human Rights (Article 26) provides that everyone has the right to education and that education shall be directed to the full development of the human personality. It might be claimed that in certain circumstances at least, teaching in the mother tongue is a necessary requirement for achieving this aim. The Special Statute contains, however, positive and detailed provisions in this regard. Schools according instruction in the mother tongue shall be maintained in all localities in the Italian-administered area where there are children members of the Yugoslav ethnic group, and in all localities in the Yugoslav-administered area where there are children members of the Italian ethnic

group. No minimum number of school children, absolute or relative, is stipulated. The reasonable interpretation of the somewhat sweeping provision ("where there are children") is made possible through the addition that the Italian and Yugoslav governments agree to maintain the existing schools which are set out in a list attached to the Special Statute. The two governments have undertaken to consult in the Mixed Committee, the functions of which are described below, before closing any of these schools.

The Special Statute guarantees equality of treatment of these schools of the protected groups with other schools of the same type as regards provision of textbooks, buildings and other material means, the number and position of teachers and the recognition of diplomas. The two governments have undertaken to endeavor to ensure that the teaching in such schools will be performed by teachers of the same mother tongue as the pupils. Provisions analogous to those of Article 2 (d) on diplomas and certificates of persons engaged in professions or trade are also made for teaching diplomas. The Special Statute prohibits de-nationalization by way of schools: the educational programs of such schools must not be directed at interfering with the national (*i.e.*, ethnical) character of the pupils.

The use of languages in the relations between the individual and courts and other authorities and the languages of inscriptions in public places is regulated in Article 5. Members of the Yugoslav ethnic group in the area administered by Italy and members of the Italian ethnic group in the area administered by Yugoslavia shall be free to use their language in their personal and official relations with the administrative and judicial authorities of the two areas. While the two languages do not have equal status, the Special Statute contains provisions which appear to satisfy reasonable practical needs. The members of the protected groups have the right to receive from the authorities a reply in their language; in "verbal replies" (what is meant are oral replies), either directly or through an interpreter, the judge or official speaks to the party either in the party's own language or uses the language of the administration, in which case his pronouncement is interpreted to the party. In correspondence, a translation of the reply (by the judicial or administrative authority) as least is to be provided by the authorities. This means that, for example, the Slovene-speaking inhabitant of the Italian-administered area receives the official decision either in Italian, with a translation into Slovene attached, or directly in Slovene. Court sentences concerning members of these ethnic groups are expressly mentioned among public documents which shall be accompanied by a translation in the appropriate language. The same shall apply to official announcements, public proclamations and publications.

While these provisions apparently apply throughout the two areas, a special regime is contemplated for inscriptions on public institutions and the names of localities and streets. These are in the language of the administering authority. In those electoral districts, however, of the Comune of Trieste and in those other communes under Italian administration

where the members of the Yugoslav ethnic group constitute a significant element of the population, these inscriptions and street names will also be in the language of this ethnic group. Similarly, in those communes in the area under Yugoslav administration where the members of the Italian ethnic group are a significant element of the population, such inscriptions and names shall be in Italian as well as in the language of the (Yugoslav) administering authority. The term "significant element" is in both cases defined as "at least one-quarter."

Article 7 of the Special Statute backs up these provisions by "entrenching" the boundaries of the basic administrative units in the two areas. No change shall be made in them with a view to prejudicing the ethnic composition of the units concerned.

Incitement to National and Racial Hatred

Article 3 of the Special Statute provides that incitement to national and racial hatred in the two areas is forbidden and that any such act shall be punished. This provision is of a type similar to Article 26 of the draft Covenant on Civil and Political Rights,¹⁴ which reads: "Any advocacy of national, racial or religious hostility that constitutes an incitement to hatred and violence shall be prohibited by the law of the State."

Machinery of Implementation

The implementation provisions of Article 8 are of particular interest. It is provided that a special Mixed Yugoslav-Italian Committee shall be established for the purpose of assistance and consultation concerning problems relating to the protection of the Yugoslav ethnic group in the area under Italian administration and of the Italian ethnic group in the area under Yugoslav administration. The most pertinent precedent for the establishment of this committee is the machinery which operated under the German-Polish Convention of May 15, 1922, Relating to Upper Silesia. In the general field of human rights, nothing comparable is in existence, although the draft Covenant on Civil and Political Rights (Article 27 *et seq.*) provides for an international organ, the "Human Rights Committee," with similar competence. The European Commission on Human Rights (established under Article 19 *et seq.* of the Rome Convention of November 4, 1950) held its first session in July, 1954.

Like the German-Polish Convention Relating to Upper Silesia, the Special Statute for Trieste vests in the Mixed Committee the right to "examine complaints and questions raised by individuals belonging to the respective ethnic groups concerning the implementation of [the] Statute." The draft Covenant on Civil and Political Rights does not provide for the right of petition, while the right of petition contemplated in the European Convention on Human Rights has not yet entered into effect. The authority of the Mixed Committee is strengthened by the further provision that the Yugoslav and Italian governments shall facilitate visits by the

¹⁴ See note 11 above.

Committee to the areas under their administration and grant it every facility for carrying out its responsibility. The corresponding provision of the draft Covenant on Civil and Political Rights (Article 42) provides only that in any matter referred to it, the Human Rights Committee may call upon the states concerned to supply any relevant information. Article 28 of the European Convention provides that the states concerned shall furnish to the Commission all facilities necessary for the effective conduct of its investigations.

The last paragraph of Article 8 of the Special Statute contains a *pactum de contrahendo*, according to which the Italian and Yugoslav governments undertake to negotiate forthwith detailed regulations governing the functioning of the Committee. It may be expected that these regulations will provide for the contingency that no agreement on a controversy can be reached in the Mixed Committee.

EGON SCHWELB *

TWENTY-SIXTH SESSION OF THE HAGUE ACADEMY OF INTERNATIONAL LAW

The Academy of International Law will hold its twenty-sixth session at The Hague from July 18 to August 13, 1955. Three lecture periods will be held in the mornings from Monday until Friday of each week and one or two seminar periods will be held on some afternoons. The lectures will be delivered in French or English, and translations will be provided for students whose knowledge of either language is not sufficient to enable them to follow the lectures.

The lectures will cover the historical development and principles of international law, private international law, public administration, economics and finance, and international organization.

On the subject of the historical development of international law, the following lectures will be given: "The Crisis and Transformations of International Law," by Professor Josef L. Kunz of the Law School of the University of Toledo; "The Interparliamentary Union and Its Contribution to the Development of International Law and the Establishment of Peace," by Professor Léopold Boissier of the Faculty of Law of the University of Geneva; and "Contemporary Problems of Treaty Law," by Professor Covey T. Oliver of the Law School of the University of California.

A general course of ten lectures on the principles of public international law will be given by Georg Schwarzenberger, Professor of International Law and Vice Dean of University College, London. "Jurisprudence and International Law" will be the subject of lectures by Professor Roberto Ago of the Faculty of Law, University of Milan. Professor Jaroslav Zourek of the Faculty of Law of Charles University, Prague, will discuss "The Definition of Aggression in International Law—Recent Developments"; Professor Roger Pinto of the Faculty of Law, University of Lille, will discuss "Prescription in International Law"; and Mr. Alwyn

* Deputy Director, Division of Human Rights, United Nations Secretariat. The views expressed in this note are those of the author and do not necessarily reflect the official opinion of the United Nations Secretariat.

V. Freeman, of the staff of the Foreign Relations Committee of the United States Senate, will lecture on "Responsibility of States for Unlawful Acts of Their Armed Forces."

In the field of private international law, Professor Hans Lewald of the Faculty of Law of the University of Basle will lecture on "Present Tendencies in the Codes and Most Recent Draft Laws concerning Private International Law," and Mr. Wilfred Jenks, Assistant Director General of the International Labor Organization at Geneva, will discuss the "International Protection of Freedom of Association with Special Reference to Trade Union Rights."

In the field of international organization, lectures will be given by Professor Georges Berlia of the Faculty of Law of the University of Caen on "Decisions of International Tribunals Relating to Their Own Jurisdiction"; and by Mr. J. P. A. François, Secretary General of the Permanent Court of Arbitration of The Hague, on "The Origin, Case Law and Future of the Permanent Court of Arbitration."

The Academy is open to those who already have some background in international law and desire to improve their knowledge. Applications for admittance to the course of lectures must be approved by the Executive Council of the Academy, which may charge a small registration fee. Tuition is free and the conditions for admission are not rigid. Application forms and further information may be secured from the Secretariat of the Academy, Room 50, The Peace Palace, The Hague.

E. H. F.

INTER-AMERICAN BAR ASSOCIATION OFFICERS TO MEET AT NEW YORK
AND HARVARD UNIVERSITIES

Pursuant to a cordial invitation extended by Dean Russell D. Niles, the officers, members of the Council and chairmen of committees of the Inter-American Bar Association will meet on April 29, 1955, at New York University School of Law, Washington Square, New York City, to make plans for the IXth Conference of the Association, which will be held at Dallas, Texas, April 16 to 21, 1956, with the Southwestern Legal Foundation, the State Bar of Texas and the Dallas Bar Association as hosts.

The Inter-American Bar Association is composed of 78 associations that are united to carry out the following purposes:

To establish and maintain relations between associations and organizations of lawyers, national and local, in the various countries of the Americas, to provide a forum for the exchange of views.

To advance the science of jurisprudence in all its phases and particularly the study of comparative law; to promote uniformity of commercial legislation; to further the diffusion of knowledge of the laws of the various countries throughout the Americas.

To uphold the honor of the profession of the law; and to encourage cordial intercourse among the lawyers of the Western Hemisphere.

To meet in conferences from time to time for discussion and for the purposes of the Association.

Since the Association was organized in Washington, D. C., on May 16, 1940, at the close of the Eighth American Scientific Congress,¹ eight conferences have been held in the following cities: Havana, Cuba, 1941;² Rio de Janeiro, Brazil, 1943;³ Mexico City, 1944;⁴ Santiago de Chile, 1945;⁵ Lima, Peru, 1947;⁶ Detroit, Michigan, 1949;⁷ Montevideo, Uruguay, 1951;⁸ São Paulo, Brazil, 1954.⁹

The conference of the Association held in São Paulo, Brazil, from March 15 to 22, 1954, was attended by approximately 350 lawyers from nearly all the countries of the Americas. At the closing session of the conference ninety resolutions were adopted. A number of these resolutions directed that the Executive Committee, under the chairmanship of Dr. Eduardo Salazar Gomez of Quito, Ecuador, appoint special committees to make studies and prepare reports on a number of subjects for consideration at the Dallas Conference. At the last meeting of officers and members of the Council, held at the Pan American Union on July 13, 1954, it was decided to appoint committees on the following subjects:

Continental shelf.

Arbitration of international disputes in the Americas under treaty provisions.

To study revision of the United Nations Charter.

To study advisability of organizing economic assistance to lawyers in this Hemisphere.

To investigate the advisability of adopting principles respecting expropriation of property.

To carry out practical studies concerning the problems of "causa" and consideration.

To make a comparative study of American legislation concerning the desirability of giving universal effect to decisions which adjudicate upon the status of the family.

¹ Proceedings, Eighth Scientific Congress. See also this JOURNAL, Vol. 37 (1943), p. 106.

² Proceedings, First Conference, Havana, 1941.

³ Proceedings, Second Conference, Rio de Janeiro, 1943. See also this JOURNAL, Vol. 37 (1943), p. 666.

⁴ Proceedings, Third Conference, Mexico City, 1944. See also this JOURNAL, Vol. 38 (1944), p. 684.

⁵ Proceedings, Fourth Conference, Santiago de Chile, 1945. See also this JOURNAL, Vol. 39 (1945), p. 553.

⁶ William Roy Vallance, "Legal Education and Other Subjects," Journal, Bar Association of the District of Columbia, Vol. 15 (1948), p. 198; Carolyn Royall Just, "Report on Fifth Conference at Lima," *ibid.*, p. 464. See also this JOURNAL, Vol. 42 (1948), p. 423.

⁷ Eldon S. Lazarus, "Sixth Conference of the Inter-American Bar Association," Tulane Law Review, Vol. 24 (1949), p. 101. See also this JOURNAL, Vol. 43 (1949), p. 130.

⁸ Oliver Schroeder, Jr., "Report on the Seventh Conference of the Inter-American Bar Association," Ohio Bar Journal, Vol. 25 (1952), p. 15.

⁹ "Eighth Conference of the Inter-American Bar Association, São Paulo, Brazil, 1954," Michigan State Bar Journal, Vol. 33, No. 7 (July, 1954), pp. 7-35.

To study suggestions concerning protection of intellectual creative activities and intellectual property.

To study propositions formulated in the report of September 23, 1952, of the Inter-American Juridical Committee of Rio de Janeiro on international co-operation in judicial procedure.

To study application of uniform law on bills of exchange and other negotiable instruments.

To investigate the advisability of taking action proposed concerning unification of commercial laws in the Americas.

To study draft uniform legislation concerning mortgages on ships.

To study and prepare draft of uniform law on limitation of liability of maritime carriers.

To study and disseminate information regarding the institution of trusts, the Secretary to have headquarters in the Center of Latin American Studies of the Law School of the University of Miami.

To make more uniform the various terminology used in regard to documentary letters of credit and trusts.

To report on possibility of uniformity of legislation with respect to liability of air carriers and if possible, to present a uniform law on this subject.

To organize inter-American juridical information, composed of one representative of each one of the member associations to organize the interchange of all kinds of information and juridical material concerning the American nations.

To collect data and suggest a comprehensive plan with respect to assistance and social security for lawyers adopted by American countries

To study and report regarding the advisability of creating an information service for gathering and distributing data on the protection of industrial property.

To study whether laws should be enacted establishing compulsory (integrated) bar associations.

To unify measures to prevent and punish the illegal exercise of the practice of law in the Americas.

Members of the Council have suggested the names of lawyers from their respective countries for membership on these committees and several of them are already carrying on work through correspondence.

At the New York meeting of the Council, business sessions at 9:30 a.m. and 2:30 p.m. will be presided over by Robert G. Storey of Dallas, Texas, President of the Association and former President of the American Bar Association. Reports will be made by the officers and members of the Council. The group will be guests of New York University School of Law at a luncheon at 12:30 p.m. At 5:30 p.m. the Inter-American Law Institute of New York University will tender a reception to Council members, Association officers and officers of member associations in New York (including the Association of the Bar of the City of New York, the New York State

Bar Association, the New York County Lawyers Association, the American Foreign Law Association, the Consular Law Society and the Association of the Customs Bar).

The Council will continue its meeting on April 30, 1955, at Harvard Law School, Cambridge, Massachusetts, opening at 10:00 a.m. During the morning there will be talks concerning the Harvard program by Director of International Legal Studies Milton Katz on the general objectives of international legal studies, by Professor A. T. von Mehren on the comparative law program, by Professor Kingman Brewster on legal problems of doing business abroad, by Associate Dean David Cavers on research plans and objectives, by Mr. Marvin S. Fink on the utilities project, by Professor Stanley Surrey on the international program in taxation, and by Director William S. Barnes on the *World Tax Series*. A tour of the Harvard Law School, informal meeting with Latin American law students, 1:00 p.m. lunch at the Continental Hotel, and 2:30 business meeting of the Council are also scheduled. Roscoe Pound, former Dean of Harvard Law School, has consented to speak informally to the group at the afternoon session.

WILLIAM ROY VALLANCE

FORD FOUNDATION GRANTS

Readers of this JOURNAL will rejoice in the grants recently made by the Ford Foundation to promote and improve international legal studies in American law schools. On January 9, 1955, the Foundation announced grants for this purpose of \$2,050,000 to Harvard, \$1,500,000 to Columbia, \$600,000 to Stanford, and \$500,000 to the University of Michigan, in each case the capital amount and income to be used or committed within a ten-year period. Later a similar grant of \$300,000 to the University of California was announced.

In its announcement and its communications to the universities, the Ford Foundation indicated its purpose to help improve leadership in American life by giving Americans trained in law (from whose ranks come so many leaders in government, business and community life) a better understanding of, and competence in, international affairs.¹ The grants are to assist each of these law schools in its aim to stress training in international law and foreign law as an integral part of undergraduate studies in the law school, as well as to provide training in the United States for able lawyers from foreign countries, to aid research in international and comparative law, to train teachers in these subjects, and to give specialized instruction in relation to international and foreign problems.

The grant to Harvard Law School will be used to cover half the cost

¹ Cf. Kunz, "A Plea for More Study of International Law in American Law Schools," this JOURNAL, Vol. 40 (1946), p. 624; Franklin, "The Teaching of International Law in Law Schools," *ibid.*, Vol. 46 (1952), p. 140; Bishop, "International Law in American Law Schools Today," *ibid.*, Vol. 47 (1953), p. 686; Carlston, "The Teaching of International Law in Law Schools," Columbia Law Review, Vol. 48 (1948), p. 516.

of an addition to the present buildings to house the school's international activities; to endow two professorships; and to provide on a ten-year basis for advanced fellowships, research, library staff, and co-operation with other institutions. \$1,300,000 of the grant to Columbia will go toward the cost of a new building for the Law School, the remainder being used to support research (including the preparation of teaching materials), work seminars and conferences, exchanges with other schools, and co-operation with other schools in the development of international studies programs. At Stanford \$250,000 will provide an endowment to defray part of the cost of an additional professorship, and the remainder (principal and income) will be devoted to additional faculty, graduate fellowships, research, preparation of teaching materials, and conferences and exchanges with other schools. At Michigan it is expected that principal and interest will furnish about \$60,000 per year for the next ten years, to be allocated to part of the cost of an additional professorship in the field of international legal studies, fellowships for more foreign students and American students specializing in advanced work in this field, research, travel, conferences, and various types of co-operative activities. California's grant is to be used chiefly for research, fellowships, travel, and miscellaneous activities.

As one of its first major projects under the Ford Foundation grant, the University of Michigan Law School is planning to hold in Ann Arbor a conference of teachers of international law in American law schools in late June, 1955. Sessions will probably be devoted to the general progress of the United Nations and international law since 1945, and will be open at least in large part to any persons interested in international law. Further information regarding these plans may be obtained from the undersigned, at the University of Michigan Law School, Ann Arbor, Michigan.

WM. W. BISHOP, JR.

JUDICIAL DECISIONS

BY OLIVER J. LISSITZYN *

Of the Board of Editors

Foreign nationality—proof—consular certificate—international status of India before and after Aug. 15, 1947—recognition

MURARKA v. BACHRACK BROS. 215 Fed. (2d) 547.

U. S. Ct. of Appeals, Second Circuit, Aug. 3, 1954. Harlan, Ct. J.

In an action for breach of contract commenced on July 14, 1947, by partners doing business in Delhi, India, against a New York corporation, defendant objected to the jurisdiction of the court on the ground of failure of proof that plaintiffs were "citizens or subjects" of a foreign state and thus entitled to invoke the diversity-of-citizenship jurisdiction of the Federal court. Plaintiffs originally alleged that each of them was "a subject of Great Britain," but, after the complaint had been dismissed without prejudice in 1952 for failure of proof of this allegation, amended the complaint in January, 1953, to allege that each of them was "a British Indian citizen." The district court found that each of the plaintiffs was a "British Indian citizen and subject of Great Britain." On appeal after a trial on the merits, it was held that the district court had jurisdiction. Taking judicial notice of "the essential historical facts," the Court of Appeals mentioned the establishment of an Interim Government of India on Sept. 2, 1946, and the British announcement on Feb. 20, 1947, of intention to transfer power, and pointed out that on Aug. 15, 1947, the Union of India became "a self-governing member of the British Commonwealth of Nations," and eventually (in 1950) a republic. The court also found, on the basis of a State Department communication before the trial court, that:

although our Government did not formally recognize India as an independent nation until August 15, 1947, it took steps to recognize the Interim Government of India after its formation . . . by receiving in February 1947 India's first ambassador, whose credentials were signed by the British Crown, and accrediting the first United States ambassador to India in April 1947. . . . [W]e view the statement in the State Department communication to the effect that India did not become independent until August 15, 1947, as being rather in the nature of a legal conclusion which adds little more to the significance of the already existing relations between that Government and our own. . . . True, as of July 14, 1947, our Government had not yet given India *de jure* recognition, but its exchange of ambassadors in February and April 1947 certainly amounted at least to *de facto* recognition, if not more. To all intents and purposes, these acts constituted a full

* With the assistance of Mrs. Alma Suzin Flesch, made possible by Columbia University.

recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away (see U.S. Foreign Relations 1913, p. 102), which was followed a month later, when partition took place between India and Pakistan, by the final severance of India's status as a part of the British Empire. The significance of these events is not lessened by the fact that the credentials of the first Indian Ambassador to the United States were signed by the British Crown. We think that in its setting that act is more properly to be regarded as a mere expediency rather than as a significant act of sovereignty in the usual sense of that term. Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States.

Furthermore, the court pointed out, since the statute of limitations had not run, the amended complaint could have been filed originally in January, 1953, when India "was unquestionably an independent foreign power fully recognized by the United States." The finding that plaintiffs were "British Indian" citizens, if supported by the evidence, was an adequate basis of jurisdiction, even though the evidence did not warrant the finding that each plaintiff was a "subject of Great Britain."

The court further held that the proof of plaintiffs' Indian citizenship was adequate. This proof consisted of a certificate of the Indian Vice Consul at New York issued with the authorization of the Indian Ministry of External Affairs which in turn acted upon a certificate of the District Magistrate at Delhi. The court said in part:

What was sought to be proved was not a foreign record, but a determination of the Indian Government, that the plaintiffs were Indian citizens. The requirements for proof of foreign public records . . . have no application here. The Consular certificate was properly authenticated by the Vice Consul who made it, who also testified that he had acted under instructions from his Government. And the plaintiffs are entitled to the presumption of regularity which has long been attached to the procedures of foreign governments and agencies. . . . It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, Signed [*sic*] at the Hague, April 12, 1930, Arts. 1 and 2; Briggs. The Law of Nations, pp. 458-60 (2d ed. 1952); Dept. of State Bull. XXII, No. 559, pp. 433-441 (March 20, 1950); *Stoeck v. Public Trustee*, 2 Ch. 67 (1921). While neither side has given us a judicial decision involving such proof of foreign citizenship as was made here, we entertain no doubt on principle that the proof was competent. Cf. Decision No. 1 of British-Mexican Claims Commission in Great Britain (*Lynch Claim*) v. Mexico. . . . Our statutes provide for the issuance of certificates of United States nationality to others than naturalized citizens, by the Secretary of State, or by officials to whom he has delegated such power, for use in foreign judicial or administrative proceedings, 8 U.S.C.A. §§ 1502, 1104, and we see no reason why our courts should not give presumptive credit to similar certificates of foreign governments. The defendant has cast no cloud on the validity or accuracy of the consular certificate itself.

Foreign acts of state—torts—real property—Nicaragua

PASOS v. PAN AMERICAN WORLD AIRWAYS. Civ. No. 33-273 (unreported).

U. S. District Court, S.D.N.Y., June 7, 1954. Edelstein, D. J.

Plaintiff brought an action for trespass upon or injury to real property in Nicaragua. The facts as found and stated by the court were substantially as follows: Defendant in 1929 began using in Nicaragua an airfield built, occupied and controlled by the U. S. Marines on land turned over to them in 1927 by the Government of Nicaragua. When the Marines left in 1933, the Government of Nicaragua, which assumed the occupation and control of the field, permitted defendant to continue using it. By a contract made in 1934, the government delegated to defendant the powers of administration over the field.¹

The court dismissed the action, and in a memorandum opinion said in part:

This court will not pass judgment upon the acts of a foreign sovereign within its own border. . . . The plaintiff does not purport to contest the validity of acts of the Nicaragua Government; he merely urges an interpretation of those acts that is consistent with his causes of action. The Government of Nicaragua, in a diplomatic note forwarded by the Department of State through the Attorney General and the United States Attorney for this district, has taken the position that the validity and legality of the acts of the sovereign Government of Nicaragua are being attacked in this suit. The Department of State, however, has made no suggestion of immunity to the court, but has instead maintained a position of "courteous neutrality."

The court went on to say that its "factual conclusions" indicated that "it would indeed be necessary to examine into the acts of the Nicaragua Government done in Nicaragua, if the plaintiff were to prevail."

Transfer of legacy to Hungary—effect of certificate of Hungarian Minister

IN RE SIEGLER'S WILL. 132 N. Y. Supp. (2d) 392.

New York, Sup. Ct., App. Div., 3d Dept., July 8, 1954. Foster, Pres. J.

The Consul General of the Hungarian People's Republic, as representative of certain Hungarian legatees under a will, appealed from an order of the Surrogate directing the executor to pay the legacies into court to be held for the benefit of the legatees. Such an order is authorized by § 269 of the New York Surrogate's Court Act if it appears that the legatee would not have the benefit, use, or control of the money due him. The only question was whether the Surrogate had sufficient proof to justify the invocation of § 269.

The order was affirmed. It is true, the court said, that the Hungarian Minister Plenipotentiary stated that the legatees would have the full benefit of the legacies and that between 1947 and 1953 the Hungarian Consular Section transmitted \$100,000 to Hungarian residents entitled

¹ Plaintiff's alleged interest in the property was not stated in the opinion.—Ed.

thereto. This declaration distinguished the instant case from *In re Braier*.¹ On the other hand, the Surrogate had before him two letters, one from the Department of Justice and one from the Department of State, both of which called his attention to a Treasury regulation which forbade the transmission of checks drawn on the United States to Hungarian residents because local conditions in Hungary made it uncertain that the payees would receive them or be able to negotiate them at full value. The court stated in part:

In normal times we assume that a local court would probably accept the certificate of an Envoy to this country from a friendly power as to internal conditions in his country. But these are not normal times. . . . Indeed it is quite apparent from the utterances of two governmental departments that the United States has no policy that would require a local court to give full faith and credit to the certificate of the Hungarian Envoy. We conclude therefore that the Surrogate was not bound by the certificate.

Consular immunities—treaties with Italy and Great Britain—traffic violation

PEOPLE v. AMATO. Docket No. 204361 (unreported).²

New York, City Magistrate's Ct., Municipal Term, Brooklyn, May 17, 1954. McKean, City Magistrate.

Dismissing a charge of speeding, the court addressed the defendant as follows, in part:

It is a case out of Flushing Traffic Court in which an attaché of the Italian Consul General's Office claimed immunity under a treaty between Italy and the United States and between Britain and the United States containing the "most favored" clause. And I wish to tell you, Mr. Amato, the Police Legal Bureau sent a couple of men to Washington, examined all the treaties and archives and they agree with you that unless the Consul himself consents that you be prosecuted, that you do have an immunity.

Sovereign immunity—ships—claim by foreign government—manifest defect in title

JUAN YSMAEL & Co., INC. v. GOVERNMENT OF THE REPUBLIC OF INDONESIA. [1954] 3 W.L.R. 531.

Jud. Comm. of the Privy Council on appeal from Hong Kong, Oct. 7, 1954. Earl Jowitt.

Appellants, a Philippine corporation, chartered a vessel to the Government of Indonesia for the carriage of troops under successive charter parties, the last of which was due to expire on June 30, 1952. Under the charter party, possession of the vessel did not pass to the government. In March, 1952, a person holding a power of attorney from appellants purported to sell the vessel to the respondent under a contract made in

¹ This JOURNAL, Vol. 47 (1953), p. 506.

² A copy of this decision was made available by Dr. Albano Murgi, of New York.

disregard of express instructions from appellants which were known to respondent's purchasing agent. Thereafter, respondent took steps to implement the title it claimed, entering the vessel on the Indonesian register, but the ship remained in the legal possession of appellants at Hong Kong through the acting captain, who refused to accept from respondent an order of dismissal.

On June 27, 1952, appellants, by a writ *in rem* against the vessel issued in Hong Kong, claimed to have legal possession of the vessel decreed to them. The vessel was arrested and remained thereafter in the custody of the head bailiff of the Supreme Court of Hong Kong. The Government of Indonesia, appearing under protest, moved that the writ and all subsequent proceedings be set aside, on the ground that the writ impleaded a foreign sovereign state and that the Government of Indonesia was the owner or was in possession or control, or entitled to possession, of the vessel. The trial court dismissed the government's motion and decreed possession to appellants, subject to a claim by a third party for the cost of repair work done on the vessel. The Appeal Court of Hong Kong rescinded the judgment below and ordered that the writ and all subsequent proceedings be set aside on the ground that the action impleaded a foreign sovereign state.

On appeal, the Judicial Committee of the Privy Council set aside the judgment of the Appeal Court and remitted the case for consideration of certain other questions. Recalling the rule that the courts would not seize or detain the property of a foreign sovereign or property of which he is in possession or control, the Court said:

Where the foreign sovereign State is directly impleaded the writ will be set aside, but where the foreign sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question the immunity ceases to be of any practical effect. . . . In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.

In this case, the Court held, the evidence of respondent's title to the ship was "manifestly defective," since respondent was chargeable with knowledge that the contract of sale had been made contrary to appellants' instructions. Consequently, respondent had not established that it possessed such an interest in the ship as would show that it, respondent, was im-

pleaded. The Court noted in passing that since the vessel was used for carrying troops, "the question raised in some of the cases whether a right of immunity can be claimed for a ship used by the foreign government solely for commercial purposes does not arise."

Enemy property—Paris Inter-Allied Reparations Agreement—Washington Agreement with Switzerland concerning German assets—effect in Belgium of decisions under the Washington Agreement—retention of control by German nationals

SOCIÉTÉ ANONYME ÉTABLISSEMENTS AÉROXON v. OFFICE DES SÉQUESTRES.
141 *Pasicrisie Belge* (1954) 1.

Belgium, Court of Cassation, Sept. 17, 1953.

The property of Aeraxon, a wholly-owned Belgian subsidiary of the Swiss corporation, Orion, was held by the Belgian Office of Sequestration to be German-owned, on the ground that Orion was a German-controlled corporation. This decision was affirmed by the Court of Appeal of Brussels. The Court of Cassation affirmed the decision below, rejecting Aeraxon's contention that Belgium and the Belgian authorities were bound, under the Paris Inter-Allied Reparations Agreement of January 14, 1946, and the Washington Agreement of May 25, 1946, concerning German assets in Switzerland, to respect the finding of the Swiss Office of Compensation, which was approved by the Swiss Mixed Commission, that 80% of Orion's stock was held by Swiss citizens and that consequently Orion was not German-controlled. The court held that under the two agreements the findings concerning assets located in Switzerland were not applicable to assets located within the territory of one of the Allied Powers, with respect to which that Power remained free to take such measures as it judged proper. Here the Belgian authorities found that the former German owners of a majority of Orion's shares, transferred to Swiss citizens in July, 1939, retained indirect control over them.

Expropriation of foreign property—Iran—effect in Italy—compensation—concession contracts—international law in Italian courts—resolutions of U.N. General Assembly

ANGLO-IRANIAN OIL CO. LTD. v. SOCIETÀ S.U.P.O.R. No. 3906/53.¹
Italy, Civil Tribunal of Rome, Sec. I, July 14, 1954.

Plaintiff sued to recover oil extracted from the area of its concession in Iran and imported into Italy by defendant, contending that the Iranian legislation of 1951, whereby the oil industry in Iran was nationalized, was inapplicable in Italy as being repugnant to the Iranian Constitution, to Italian public order, and to generally accepted norms of international law; and as being political, discriminatory and confiscatory in character, since it provided for expropriation without compensation.

The claim was rejected. The court noted that plaintiff's claim depended

¹ A copy of this decision was made available by Dr. Angelo Piero Sereni, of the New York Bar.

on the assumption that the right of extraction granted by the concession carried with it title to the mineral extracted by anybody within the area of the concession. But the presumption of title, the court added, was in favor of the person in possession, this being a procedural rule governed by *lex fori*.

The court went on to say that if the principles invoked by plaintiff were applied, the Iranian law of 1933 approving the concession was itself not enforceable in Italy, since it provided for expropriation of previously existing rights within the concession area for the benefit of the company without a definite procedure or criteria for fixing compensation. But plaintiff's contentions, the court continued, were impossible to accept, and both the 1933 and the 1951-1952 Iranian legislation were applicable in Italy. In the Italian legal system, as shown by several decisions, there is a recognized power of expropriation even in relation to immovables which the administration had undertaken by contract not to expropriate. The exercise of such power, therefore, could not be regarded as contrary to Italian public order. In Italy, furthermore, the right to extract minerals is a personal right the expropriation of which is not subject to compensation. But a right to indemnity is recognized by the Iranian law of 1951, which indicates that it is subject to a preliminary administrative procedure and ultimately to judicial control. This law is not contrary to the Iranian Constitution, which provides for "equitable" compensation, and in the proceedings before the International Court of Justice Iran recognized not only the right to indemnity, but also the possibility of its enforcement through ordinary Iranian courts. Under Iranian law, such recognition binds the Iranian state toward plaintiff. However, neither by Italian law nor by generally recognized norms of international law is it required that the quantum of the indemnity be effectively adequate to the value of the object taken. It is enough that there is compensation.

There was, furthermore, a public economic interest in the nationalization, and therefore the law cannot be held "political" and denied effect in Italy. This also showed that the law was not discriminatory, while its alleged confiscatory character was disproved by the motivation (protection of Iranian public interest) and the recognition of the right to compensation. The text of the law shows no intention to persecute, and there is no room for research into the underlying subjective motives of the legislators not revealed by the text.

The court further discussed the non-applicability of political laws contrary to "international public order" or repugnant to the norms of international law referred to in Article 10 of the Italian Constitution, "that is, to all the norms of the law of nations which all the civilized peoples admit and which they apply by international custom, or to those international treaties which are capable of producing international juridical norms." The court indicated that the resolution of the United Nations General Assembly adopted on December 21, 1952, recommending non-interference with the states' exercise of sovereignty over their own natural resources, might be regarded, in the light of its timing (less than a month

after the passage of the Iranian law of November 26, 1952), as recognition of the international legitimacy of the Iranian nationalization laws. The court further referred, *inter alia*, to the recognition by the United Kingdom, on August 3, 1951, of the principle of nationalization of Iranian oil, the view of the International Court of Justice that the concession agreement was a mere contract with a private company,² the decisions of the Tribunal of Venice³ and of the court of Tokyo (Sept. 21, 1953) concerning Iranian oil, and 1939 decisions by the courts of various nations concerning the expropriated Mexican oil. The court added, however, that Italian courts may pass on the repugnance of a foreign law to the constitution of the foreign country, international public order, or generally recognized norms of international law, and that they must deny effect in Italy to a foreign law providing for expropriation not for motives of public interest, but for motives of political character, persecution, discrimination, race or confiscation, or without compensation.

The court concluded by stating that even if the Iranian law is not applicable because of failure to provide compensation, plaintiff's claim must be rejected because plaintiff did not sustain the burden of proof of ownership, the 1933 concession and the Iranian law then in force being interpreted to mean that plaintiff became the owner of only the oil extracted by it.

Belligerent occupation—requisition—new methods

AGATI v. SOC. ELETTRICA COLONIALE ITALIANO. *Annali di Diritto Internazionale*, Vol. IX (1951), p. 154.

Tribunal of Tripoli, November 20, 1950.

The question presented was whether the contractual relationship between the company and its employees subsisted. The court held that it did not. During the war the Allied governments "took into custody" property of enemy states in Africa, and in Italy assumed "control over goods essential to the needs of the armed forces and the inhabitants of the occupied territory" (Proclamation No. 6 of September 12, 1943). These methods of taking custody or control, the court said, are not contemplated by the Hague Convention, which prohibits requisition of property except for the needs of the armed forces. Because of the total character of modern wars, states which have remained faithful to the humanitarian principles of the convention have found it necessary to develop new methods such as the above. These methods are similar to requisition in their legal effects. In this case, the taking of control of the concern by the government terminated the contractual relation between the company and its employees. Such taking was comparable to *vis major* which resulted in impossibility of performance. It was immaterial that the employees actually remained at work, since the company had been replaced by the government as a contracting party.

² This JOURNAL, Vol. 46 (1952), p. 737. ³ *Ibid.*, Vol. 47 (1953), p. 509.

NOTE: But cf. *Improta v. Ranieri*, June 8, 1951, in which the Italian Court of Cassation, Civil Section III, said that requisition of private property by the Allies for purposes other than the needs of the occupying army would have been illegal as contrary to Article 52 of the Hague Regulations. *Giurisprudenza Completa della Corte Suprema di Cassazione*, 1951, III, Pt. 1, p. 88.

In *Bertoglio v. Federal German Republic*, Dec. 30, 1950, plaintiff sued to recover the value of an automobile taken by German soldiers in 1943 and driven to Germany. Giving judgment for plaintiff, the Tribunal of Lecco, Italy, pointed out that Article 77(2) of the Treaty of Peace of 1947 provided for restitution of identifiable goods belonging to Italian citizens transported to Germany after having been taken from the owners by force. In this case, a group of German soldiers drove up to the garage where the car was stored and, pointing a machine-gun at the premises and owner, took the car. This taking was illegal under the circumstances, although the requisition of motor vehicles had been authorized by the German Commander. *Foro Padano*, 1951, p. 180.

It was held that an action lay against Italian State Railways for damages resulting from an employee's negligence during Allied occupation, since the occupation did not suspend Italian sovereignty and the Allies had not actually taken control of the railways. The Allies had expressly recognized the dependence of Italian administrative organs on the state, and the state had continued to legislate with respect to railways. *Ferrovie dello Stato v. Giordano and Rinaldi*, *Giurisprudenza Italiana*, 1951, I, Sec. 2, p. 580 (Ct. of Appeal of Naples, Jan. 29, 1951).

In the case of *Condarelli*, July 5, 1952, the Italian Court of Cassation, United Penal Sections, denied effect to a decision of the Court of Appeal of Asmara, Eritrea, created by the British occupation authorities, on the ground that the creation of the court was in excess of the powers of a belligerent occupant and violative of Article 43 of the Hague Regulations. *Rivista di Diritto Internazionale*, Vol. 36 (1953), p. 451.

The provisions of Article 43 of the Hague Regulations limiting the powers of belligerent occupants were held by the Italian Court of Cassation, United Sections, to have been superseded by the Armistice Agreement between Italy and the Allies, Article 20 *et seq.* of which granted ample legislative powers to the Allied occupation authorities, including the power to enact, with respect to the restitution of Jewish property, General Order No. 58 of the Allied Military Government. In Trieste, the applicable law is this Order, rather than Italian Government decrees of 1944 and 1945. *Genel and Bussi v. Steiner*, July 31, 1952, *Rivista di Diritto Internazionale*, Vol. 36 (1953), p. 248.

Members of the police of the Military Government of Trieste were held not to be employees of the Italian state, unlike employees of the Italian Administration who remained in Trieste to render service under the occupying Powers; the police force was a body instituted by the occupying authorities pursuant to powers rightfully belonging to them. *Caporiccio v. Ministero Difesa-Esercito*, *Raccolta Completa della Giurisprudenza del*

Consiglio di Stato, 1951, p. 97 (Italy, Council of State, Sec. IV, Feb. 16, 1951).

For other Italian cases dealing with belligerent occupation see *Di Varno v. Ministero A. I., Raccolta Completa della Giurisprudenza del Consiglio di Stato*, 1950, p. 1010 (Council of State, Sec. VI, Sept. 25, 1950); *Durazzo v. Ferraguti, Annali di Diritto Internazionale*, Vol. IX (1951), p. 167 (Ct. of App. of Trent, Feb. 19, 1951); *Cassa di Risparmio di Bolzano v. Augustin, Foro Padano*, 1951, p. 472 (Ct. of App. of Trent, March 21, 1951); *Ciraolo v. Nicoletti, Annali di Diritto Internazionale*, Vol. IX (1951), p. 182 (Ct. of Cassation, Civil Section I, May 5, 1951); *Ministero dei Trasporti v. Fusi, Annali di Diritto Internazionale*, Vol. IX (1951), p. 147 (Ct. of Cassation, United Civil Sections, July 31, 1950); *Fabris v. Steinkuhl, Foro Italiano*, 1952, I, p. 61 (Ct. of Cassation, Civil Sec. I, April 21, 1951); and *Case of Grizanchich, Foro Italiano*, 1952, II, p. 157 (Ct. of Assize of Trieste, March 3, 1952).

For a comprehensive survey of Greek cases on belligerent occupation, see Tenekides, "Occupatio Bellica and the Recent Greek Jurisprudence," *Journal du Droit International (Clunet)*, Vol. 80 (1953), p. 823.

NOTES

American Cases on Enemy Property Controls

Enemy property controls were involved in the following cases: *Ecker v. Atlantic Refining Company*, 125 F. Supp. 605 (U. S. Dist. Ct., D. Md., Civ. Div., Oct. 26, 1954); *Yaichiro Akata v. Brownell*, 125 F. Supp. 6 (U. S. Dist. Ct., D. Hawaii, Nov. 3, 1954); *In the Matter of the Yokohama Specie Bank Ltd.*, 121 N.E. (2d) 631 (Ct. of App. of N. Y., July 14, 1954); *In re Gaspar's Estate*, 275 Pac. (2d) 656 (Sup. Ct. of Montana, Oct. 21, 1954); *In re Von Rumohr's Will*, 135 N. Y. Supp. (2d) 177 (N. Y. Sup. Ct., App. Div., 4th Dept., Nov. 7, 1954); *Bingham and Company v. Bie*, 133 N. Y. Supp. (2d) 453 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. III, May 28, 1954); and *In re Heubach's Will*, 134 N. Y. Supp. (2d) 169 (N. Y. Surr. Ct., Kings Co., Aug. 31, 1954).

American Cases on Nationality

In *Reaume v. U. S.*, 124 F. Supp. 851 (U. S. Dist. Ct., E.D. Mich., S. D., Aug. 9, 1954), a native-born citizen who lost his nationality by making in Canada a declaration of allegiance to the King and serving in the Canadian Navy, and regained his American nationality by executing an oath before an American Consul in Canada under Title 8 U.S.C. § 723 (Nationality Act of 1940 § 323 as amended), was held not to have lost his nationality again by subsequent three-year residence in Canada, since he was a native-born and not a naturalized citizen.

In *U. S. ex rel. Lee Kum Hoy v. Shaughnessy*, 123 F. Supp. 674 (U. S. Dist. Ct., S.D.N.Y., Aug. 31, 1954), it was held that persons seeking to enter the United States under claim of nationality by descent from citizens could be required to submit to paternity blood tests as a condition of ad-

mission, but that a limitation in practice of this requirement to persons of Chinese race would be a denial of due process. The court said in part: "A minority could be as effectively persecuted by enforcing a law against them alone as by acting against them without warrant of law."

The return of an alien from Mexico after a four-hour visit specifically authorized by a military pass while alien was serving in U. S. Armed Forces was held not an illegal entry which would preclude alien's naturalization. *Petition for Naturalization of Barandarian*, 123 F. Supp. 827 (U. S. Dist. Ct., S.D.N.Y., Sept. 13, 1954); cf. *Petition for Naturalization of Matesich*, 124 F. Supp. 844 (U. S. Dist. Ct., S.D.N.Y., Sept. 27, 1954) (temporary admission as alien seaman).

In exclusion proceedings, prior administrative admission as citizen is not *res judicata*; witness may be compelled to appear and testify on question of nationality of person sought to be excluded. *In re Wing*, 124 F. Supp. 492 (U. S. Dist. Ct., N.D. Calif., S.D., Sept. 14, 1954).

Record of conviction not before court on appeal must be considered as supporting decision below granting naturalization. *U. S. v. Vanegas*, 216 Fed. (2d) 657 (U. S. Ct. of App., 9th Cir., Oct. 30, 1954).

Nationals by birth expatriated themselves by remaining outside the United States during World War II for the purpose of evading military service. *Gonzales v. Landon*, 215 Fed. (2d) 955 (U. S. Ct. of App., 9th Cir., Sept. 8, 1954); *Vidales v. Brownell*, 217 Fed. (2d) 136 (U. S. Ct. of App., 9th Cir., Nov. 10, 1954).

Application of U. S. citizen in Japan during World War II for recovery of previously renounced Japanese nationality was not voluntary and did not result in expatriation. *Fukumoto v. Dulles*, 216 Fed. (2d) 553 (U. S. Ct. of App., 9th Cir., Oct. 5, 1954).

Involuntary military service in Italy did not result in expatriation. *Taormina v. Taormina Corporation*, 109 Alt. (2d) 400 (Ct. of Chancery of Delaware, New Castle, Nov. 24, 1954).

Claim of nationality in deportation proceedings may be tested by habeas corpus. *Ex parte Gros*, 123 F. Supp. 718 (U. S. Dist. Ct., N.D. Calif., S.D., June 16, 1954); see also *U. S. ex rel. Leong v. O'Rourke*, 125 F. Supp. 769 (U. S. Dist. Ct., W.D. Mo., W.D., Sept. 7, 1954).

Jurisdictional and procedural issues were involved in the following actions for declaratory judgments to establish U. S. nationality: *Fong Wone Jing v. Dulles*, 217 Fed. (2d) 138 (U. S. Ct. of App., 9th Cir., Nov. 23, 1954); *Chow Sing v. Brownell*, 217 Fed. (2d) 140 (U. S. Ct. of App., 9th Cir., Nov. 24, 1954); *Brownell v. Lee Mon Hong*, 217 Fed. (2d) 143 (U. S. Ct. of App., 9th Cir., Nov. 24, 1954); *Shew v. Dulles*, 217 Fed. (2d) 146 (U. S. Ct. of App., 9th Cir., Nov. 24, 1954); *Wong Fon Haw v. Dulles*, 125 F. Supp. 658 (U. S. Dist. Ct., S.D.N.Y., Nov. 19, 1954).

Proceedings to cancel naturalization decrees: *U. S. v. Bridges*, 123 F. Supp. 705 (U. S. Dist. Ct., N.D. Calif., S.D., Aug. 12, 1954); *U. S. v. Zucca*, 125 F. Supp. 551 (U. S. Dist. Ct., S.D.N.Y., Nov. 16, 1954); *U. S. v. Hara-jovic*, 125 F. Supp. 659 (U. S. Dist. Ct., D. Mass., Nov. 19, 1954).

Treaties and inconsistent statutes in U. S. law

Defendant could not escape liability to military service under the American statutes of 1948 (62 Stat. 604) and 1951 (65 Stat. 75) by relying on the treaty of 1928 between Latvia and the United States (45 Stat. 2641); the court found clear "Congressional purpose to abrogate any . . . treaty" inconsistent with the statute, and found it well settled that such legislation "must be upheld by the courts even in contravention of expressed stipulations in an earlier treaty." *U. S. v. Gredzens*, 125 F. Supp. 867 (D. Minn., Nov. 30, 1954).

Termination of World War II—absence of Presidential declaration

A South Dakota 1944 statute required the filing of a certificate of nomination for office not less than 90 days before election, and provided that

This act shall remain in force during such period as the existing World War II shall continue and until six months after a declaration of the termination thereof by the President of the United States. . . .

Denying plaintiff's mandamus, brought to compel acceptance of a certificate less than 90 days before election, the court referred to the public interest of absentee voters served by such a statute, and pointed out that though World War II may have terminated, no Presidential declaration thereof had been made. The court noted the Peace Treaties with Italy, Bulgaria, Hungary, Rumania and Japan, and the termination of the state of war with Germany; but referred to the "cold war" and the failure to conclude a treaty of peace with a united Germany. *Tennyson v. Saylor*, 66 N.W. (2d) 393 (S.D., Oct. 22, 1954).

War—determination of existence—Korea—insurance

Death in combat in Korea was held to have resulted from war or an act incident thereto, for purposes of a double indemnity exclusion provision in a life insurance policy. *Carius v. New York Life Insurance Company*, 124 F. Supp. 388 (U. S. Dist. Ct. S.D. Ill., N.D., Oct. 6, 1954).

Nationalization of corporation—Rumania—receivership in New York

For a case involving the appointment of a receiver under New York law (Civil Practice Act § 977b) for two foreign corporations allegedly nationalized in Rumania, see *Talmon v. Societatea Romana Pentru Industria De B.*, 132 N. Y. Supp. (2d) 776 (N. Y. Sup. Ct., Westchester Co., June 23, 1954).

Transfer of funds to U.S.S.R.—decedents' estates

In a case involving the administration of an estate, the Supreme Court of Tennessee found that "there is no prohibition on the transfer of private funds from a citizen of the United States to a citizen of Russia," citing a letter from the U. S. Department of Justice. *Hamilton National Bank v. Touriansky*, 271 S.W. (2d) 1 (Sept. 6, 1954).

Territorial waters—roadsteads—civil jurisdiction over foreign vessels—torts

In *MacKinnon v. Iberia Shipping Company, Ltd.*, [1954] 2 Lloyd's Rep. 372 (Oct. 26, 1954), the Court of Sessions of Scotland held that in order to sustain an action by a member of the crew of a British vessel registered in a Scottish port for injuries suffered on board the vessel in the course of employment while the vessel was lying at anchor in an open roadstead in the territorial waters of the Dominican Republic, it had to be shown that the claim was actionable by the Dominican law as well as by the law of Scotland, since the civil jurisdiction of the coastal state extends to foreign vessels in its territorial waters. The court indicated that no distinction can be drawn for this purpose between acts internal to the vessel and other acts; and that the same result would follow even if the vessel were merely passing through foreign territorial waters rather than lying at anchor, but not if it were lying at anchor in a roadstead more than three miles offshore.

Reciprocity in enforcing judicial orders—treaties—powers of Canadian provinces

In *Re Scott*, [1954] O.R. 676 (June 7, 1954), the Court of Appeal of the Province of Ontario, Canada, while holding *ultra vires* a provision in the Ontario Reciprocal Enforcement of Maintenance Orders Act, 1950, which dealt with the enforcement in Ontario of maintenance orders made by reciprocating states, rejected the contention that the statute was also *ultra vires* because it was an attempt by a Province to enter into an agreement in the nature of an international treaty. The court said in part, per Pickup, C.J.O.:

I am unable to see any valid legal reason why the Province of Ontario cannot, in relation to a subject-matter within its legislative jurisdiction, make a reciprocal arrangement with another Province or a foreign State in relation to such subject-matter. It is not, in my opinion, the exercise of any treaty-making authority vested in the Parliament of Canada. To hold otherwise would, I think, be to stultify the exercise within Ontario of the power which the Province undoubtedly has to provide for maintenance of wives and children who are resident within the Province. One means of doing this is by reciprocal arrangement with other States, such as appears in the statute.

Letters rogatory—Province of Ontario, Canada

For a case of appointment of a commissioner in Ontario to take evidence under letters rogatory issued by a United States court, see *Re Paramount Film Distributing Corp. v. Ram*, [1954] O.W.N. 753 (Ontario, High Ct. of Justice, Sept. 16, 1954).

Enemy property controls—effect of U. S. law in the Philippines—jurisdiction of Philippine courts

In *Brownell v. Bautista*, Decision L.J., Vol. 10 (1954), p. 846 (Sept. 28, 1954), the Philippine Supreme Court held, following its decision in

Brownell v. Sun Life Assurance Co. of Canada,¹ that the Philippine Property Act of 1946, enacted by the United States on July 3, 1946, was applicable in the Philippines after independence, but that, in an action brought by the Philippine Alien Property Administrator for partition of property vested in part by the Administrator, the Philippine courts had the power to pass on the nationality of persons whose property interests had been vested and on the validity of the vesting order, since the Administrator, by bringing an action which was not within Section 3 of the Act of 1946, submitted to the jurisdiction of the court.

Morocco—criminal jurisdiction over U. S. citizens—exchange regulations in French Zone—Treaty of Algeciras—civil jurisdiction in Tangier—International Court of Justice

In the case of *Bendayan*, *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle*, 1954, p. 182 (March 4, 1954), the French Court of Cassation held that the French courts in Morocco have jurisdiction to try American citizens charged with violations of exchange regulations, since such violations are not violations of customs regulations for the punishment of which provision is made by Article 102 of the Treaty of Algeciras of 1906.² In support of its decision, the court cited the judgment of the International Court of Justice in the *Case Concerning Rights of Nationals of U.S.A. in Morocco*.³

Relying on the decision of the International Court of Justice, above mentioned, the Court of First Instance of the Tangier International Jurisdiction held on March 9, 1954, that it had jurisdiction in civil actions by nationals of Morocco against American corporations. *X v. Mackay Radio Corporation*, 6 *Revue Marocaine de Droit* (1954) 228.⁴

Jurisdiction over crimes—acts committed abroad—fraud and forgery—extradition

A stateless person residing in France was held extraditable to Belgium on a charge of having participated, while remaining in France, in a fraudulent scheme which was attempted to be carried out by an accomplice in Belgium with the aid of forged documents, since his acts, though committed in France, were part of an *ensemble* of related acts over which Belgian courts had jurisdiction. *Case of Malinowski*, *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle*, 1954, p. 165 (France, Ct. of Cassation, Crim. Ch., March 2, 1954).

Foreign public or political law—enforcement—belligerent occupation—World War II

In two recent cases the Netherlands courts held enforceable in The Netherlands, on somewhat differing grounds, claims of the Belgian Gov-

¹ This JOURNAL, Vol. 49 (1955), p. 95. ² 34 (U. S.) Stat. 2905.

³ This JOURNAL, Vol. 47 (1953), p. 136.

⁴ It is understood that this decision was reversed on appeal, but the text of the decision of the appellate instance was not available to the editor as this issue went to press.

ernment for recovery, pursuant to Belgian legislation, of amounts paid to certain individuals by order of the German occupation authorities out of the Belgian Treasury during World War II. The payments purported to recompense the individuals concerned for damages suffered as a result of their collaboration with the German occupants during World War I. *Prof. Dr. E.M.J.C.H. v. Belgian State*, *Nederlands Tijdschrift voor Internationaal Recht*, 1953-1954, p. 208 (Ct. of Appeal, The Hague, Aug. 2, 1953); *Belgian State v. Wannijn*, *ibid.*, p. 427 (Ct. of Appeal, Hertogenbosch, June 29, 1954).

Territorial sea—extension for customs enforcement purposes

In the case of *Simpson Sones*, June 21, 1951, the Italian Court of Cassation, Penal Section I, held that, although Italy regards the territorial sea as extending six marine miles from the coast, for specific purposes a different width has been fixed, and for the purpose of customs enforcement the territorial sea extends twelve marine miles. Consequently, violations of customs regulations within this zone must be regarded as committed in Italian territory. *Annali di Diritto Internazionale*, Vol. IX (1951), p. 203. On jurisdiction in ports see *P. M. v. Fitzgerald*, *ibid.*, p. 170 (Ct. of Cassation, Penal Section I, Feb. 23, 1951).

Former Italian territories—status of judicial organs

Trieste: Italian courts repeatedly held, without deciding the question of sovereignty over Trieste after the coming into force of the Treaty of Peace of 1947, that the courts of Trieste had not ceased to be organs of the Italian state for various purposes, including that of appeals from their decisions to superior Italian courts. See, e.g., *Case of Passolunghi and Salomoni*, *Giurisprudenza Completa della Corte Suprema di Cassazione, Sez. Pen.*, 1950, III, p. 75 (Ct. of Cassation, United Penal Sections, Sept. 14, 1950); *C.E.A.T. v. Hungaria*, *Foro Italiano*, 1951, p. 281 (Ct. of Cassation, United Civil Sections, March 15, 1951); *Soc. Immobiliare Roma-Trieste v. Stabilimento Tipografico Triestino*, *Rivista di Diritto Internazionale*, Vol. 36 (1953), p. 460 (Ct. of Cassation, United Sections, July 15, 1952); *Dertenois v. Soc. Adria*, *Foro Padano*, 1951, p. 886 (Trib. of Milan, Feb. 19, 1951); and *Lloyd Triestino v. Frau*, *Foro Padano*, 1951, p. 884 (Ct. of App. of Genoa, May 12, 1951). Cf., on the status of Trieste, *Pralaz v. Pralaz Bonini*, *Annali di Diritto Internazionale*, Vol. IX (1951), p. 184 (Ct. of App. of Trieste, May 19, 1951).

Eritrea: Upholding in 1950 its jurisdiction to hear an appeal from an Eritrean court, the Italian Court of Cassation, United Penal Sections, held that the clauses of the Treaty of Peace relating to Italian possessions constituted a unilateral renunciation by Italy rather than a cession, and that the power of disposal conferred on the four principal Allied Powers and later on the General Assembly of the United Nations was that of an arbitrator and not *imperium*; consequently, these territories were *res derelictae*. During the transitory regime the ex-colonies remained under foreign oc-

cupation, and the powers of the occupants did not differ from those of belligerent occupants. Therefore, the pre-existing Italian order remained undisturbed. States must, the court added, be assumed to act in accordance with rules of international law, and acts of military authorities in occupation required by the exigencies of war must be assumed not to remain in force when the reason for them no longer exists. *Sarris v. Ahmed Ubed*, Aug. 26, 1950, *Annali di Diritto Internazionale*, Vol. IX (1951), p. 149.

Libya: Relying on the decision in the case of *Sarris v. Ahmed Ubed* (*supra*), the Italian Court of Cassation, Civil Section III, held that it could hear an appeal from the Court of Appeal of Tripoli. *Farrugia v. Nuova Compagnia Generale Autolinee*, Feb. 17, 1951, *Foro Padano*, 1951, p. 705.

Extradition—Italian Peace Treaty

Article 45 of the Italian Peace Treaty of 1947, which provided for the surrender by Italy of nationals of Allied Powers "accused" of acts of treason or collaboration with the enemy, was held by the Italian Court of Cassation not to authorize the surrender of persons convicted of such crimes. *Case of Court, Foro Italiano*, 1952, II, p. 113 (Ct. of Cass., United Penal Sections, Feb. 16, 1952); and *Case of De Serclaes, ibid.*, p. 129 (Ct. of Cass., Penal Sec. II, May 28, 1952). See also *Case of Delacovias, Annali di Diritto Internazionale*, Vol. IX (1951), p. 179 (Ct. of App. of Rome, April 23, 1951).

In *P. M. v. Minville, Giurisprudenza Completa della Corte Suprema di Cassazione, Sez. Pen.*, 1950, II, p. 78 (Italy, Ct. of Cassation, Pen. Sec., Nov. 29, 1950), the court pointed out that in the case of *Berti*, March 15, 1948, the United Sections of the court held that Article 10 of the Italian Constitution forbidding extradition for political offenses applied only to future treaties and did not render inoperative inconsistent treaties previously made.

Military government in Germany—personality and property of German concern

I. G. Farbenindustrie, a German concern, was held not deprived of its juridical personality and capacity to be a party to a suit by Allied legislation in Germany; nor was its property in Italy expropriated by such legislation. *Compagnia Farmaceutica Co-fa S.p.a. v. Farbwerke Hoechst*, *Rivista di Diritto Internazionale*, Vol. 36 (1953), p. 248 (Italy, Ct. of App. of Milan, July 4, 1952).

Nationality—effect of revocation of German racial laws

In *Fabbrica Nazionale Cilindri v. Bruckmann*, March 2, 1951, the Italian Court of Cassation, Civil Section III, took the view that a German Jew residing in Italy who had been deprived of German nationality by Nazi racial laws automatically reacquired such nationality by the repeal of the

racial laws in 1945, and must be regarded as a German national rather than as a stateless person for the purpose of applying the reciprocity requirement in the matter of the privilege of bringing suit in Italian courts. *Annali di Diritto Internazionale*, Vol. IX (1951), p. 170.

Austria—prewar treaties

In giving effect to an Austrian judgment, the Court of Appeal of Turin, Italy, held that since the reconstitution of Austria all of its treaties with Italy came back into force, including the 1922 Convention on Execution of Judgments. *Z. v. B.*, June 14, 1950, *Foro Italiano*, 1951, I, p. 486.

Copyright conventions—Czechoslovakia

In *Cederna v. Cya*, May 29, 1951, the Tribunal of Florence, Italy, held that Czechoslovakia was a party to the Berne Copyright Convention, having adhered again with retroactive effect after World War II. Prior to that, the court said, the Protectorate of Bohemia and Moravia assumed the rôle of successor to Czechoslovakia and, as such, remained a party to the convention. *Annali di Diritto Internazionale*, Vol. IX (1951), p. 192.

Sovereign immunity—Order of Malta

In *Cartolari v. Sovereign Order of Malta*, *Annali di Diritto Internazionale*, Vol. IX (1951), p. 153, the Italian Tribunal of Rome on June 1, 1951, held the Order of Malta to be a subject of international law, and, as a member of the international community, entitled to immunity from jurisdiction of the Italian courts in what was held to be performance of a sovereign rather than private function.

BOOK REVIEWS AND NOTES

NOTE BY THE EDITOR-IN-CHIEF: The JOURNAL deeply regrets that in a review of Judge Milovan Zoričić's book, *Teritorijalno More*, at page 678 of Volume 48, inaccurate factual statements were made and personal reflections were cast on Judge Zoričić from which the JOURNAL dissociates itself.—WM. W. BISHOP, JR.

International Law in Twilight. By Thomas Baty. Tokyo: Maruzen Company, Ltd., 1954. pp. 327. ¥1200.

Dr. Baty started his legal career as a civil lawyer specializing in maritime law and ended as an international lawyer. He is the author of some eighteen books on legal matters. The present book is the last one written after a lapse of twenty years since his penultimate one. His death came just after he had completed the correction of the first proof.

The book under review contains a number of fine and keen observations, not only on legal questions but also on history, politics, and especially on problems relative to Japan and the Far East. It is a condensation of his long years of experience as legal adviser to the Japanese Foreign Office.

Dr. Baty's doctrine on international law has already been set forth in his earlier works and particularly in *The Canons of International Law*, published in London in 1930. In the present book it is further developed in relation to subjects such as maritime law, neutrality, occupation and war, and so on. A comparison of legal principle between private and public law furnishes useful assistance in research in international law. The main interest of the book lies, however, in the analysis of the international community in relation to law. The author explores a particular domain of human activity upon which international law gives its norm. It is a subject-matter which has not been much explored by jurists. One of the happy exceptions is the recent work by Professor de Visscher entitled: *Théories et Réalités en Droit International Public*.¹

In Chapter 2 Dr. Baty qualifies the present state of international law as follows:

. . . there is no spirit in it. The heart has gone out of it. It resembles a building eaten up by dry-rot . . . wondering which beam and what plank will be the next to go. (p. 9.)

It is quite natural for him to say so. "International law, which rests on the world's common convictions, must inevitably sustain profound eclipse when the world ceases to have any." (p. 13.) The author attributes this condition of law to the decay of dynasties (Chap. 3) and the development of state power (Chap. 4). In these two chapters he explains at length how the decay of dynasties and the growth of the modern state brought

¹ Reviewed in this JOURNAL, Vol. 49 (1955), p. 106.

about the changes in international law. The reviewer has no space to enter into this question in detail, but recognizes the correctness of his criteria as a lawyer for assessing the actual conditions of the world and its law.

The author comes again, in the final chapter entitled "A Lurid Dawn," to the same question from a different angle. Here he makes full use of his historical erudition to present us an instructive comparison of world conditions at the present time with those of 16th and 17th-century Europe and those after the French Revolution. In the nineteenth century, "such a remarkable era of peace and progress," says the author, "each nation was content to manage its own affairs without interference. Now we find the contrary principle asserting itself again: that the profession of a particular political philosophy deprives its adherents of all natural rights, and deprives independent states of all rights to shelter or protect them." (p. 273.) It is an antithesis between Communism and parliamentary government, "a veiled conflict of individuality, freedom, spirit with mass standardization and materialism" (p. 276), a conflict between "Forceful Dictation" and "Freedom." "There is no middle of the road" (p. 282). An illuminating explanation is given about proletariat ascendancy in relation to the progress of civilization (p. 284 *et seq.*). Instructive also is the view he gives on the "astonishing spread of communism in the Far East" (pp. 291-296).

"The crisis in the fortunes of the world cannot," says the author, "be resolved by any material means; by any spider's planning or beaver's damming. It demands an altogether new outlook . . ." (pp. 299-300). He is quite right; the crisis has to be solved somehow. The point is to know how. And the author finds the way in "the dethronement of the masculine":

Masculine violence has brought about its inevitable catastrophe. Many men display in the highest degree the feminine excellences, and in the establishment of peace and harmony and the quelling of arrogance the according of the world-wide acclaim to the Feminine as supereminent is the only possible path. (p. 300.)

It reminds one of the appeal Bergson made in his last book, *Deux Sources de la Morale et de la Religion*, for a return to simplicity, to the medieval simplicity of life. Here appears an elegant silhouette of an English gentleman in the person of the late Dr. Baty.

N. Ito

The Legal Community of Mankind. A Critical Analysis of the Modern Concept of World Organization. By Walter Schiffer. New York: Columbia University Press, 1954. pp. x, 368. Index. \$5.50.

The book, finished by the author before his death in 1949, but published only now, constitutes the completion and sum of his life's work, dedicated to the critical analysis of the modern concept of world organization. He had started this investigation with his first book, written in German (1937), analyzing the doctrine of the primacy of international law as developed

by the recent science of international law. The book under review is a theoretical investigation of the conflicting concepts underlying the League of Nations and the United Nations. The investigation is centered on the League, because the United Nations is only a somewhat different attempt on the same lines. Although the League had no predecessor in positive law, its formation and the belief in its workability can only be explained by the modern concept of world organization, which again is only understandable on the basis of an investigation, starting with the *Res publica Christiana* of the European Middle Ages. The underlying modern idea of world organization is, briefly stated, the belief that universal law and order can be preserved through an association of independent states, without fundamentally altering the political structure of the world. The basic elements of this modern concept are the idea of natural law, the doctrine of the harmony of reasonable interests of men, the idea of progress, and the belief in the power of world public opinion.

The first part of the volume studies medieval unity, which appears to the author based rather on the Church than the Empire. There was an ecclesiastical centralism, with an organization and a ruler, the Pope, with canonical and natural law, but political diversity. The two spheres, spiritual and temporary, foreshadow the international and municipal spheres, coming into being after the disruption of Catholic unity and the creation of sovereign territorial states. There was, in natural law, a "higher law" based on reason and justice; there was the idea of a legal community of mankind as expressed after the Reformation in a classic statement by Suárez; there was also after the Reformation the powerful influence of Roman law.

In the Protestant Grotius we see a survival of natural law, although very different from the Catholic natural law, and a survival of the theory of a legal community of mankind, a survival also of the Catholic *bellum justum* doctrine and the dichotomy of international law in natural and "volitional" law; hence, on the higher level, we have in Grotius the idea of war as law enforcement, as a legal sanction, a stand against neutrality; but in Grotius, who foresaw no development of humanity toward these ideal conditions, his natural law is only a theory which he did not consider as a workable scheme; hence, on the "volitional" level every state has the same rights in war; he also takes a definitive stand against a world state.

Pufendorf, although dropping positive international law and considering it merely to be natural law, nevertheless opens the way to positivism. There is an individualistic tendency in him; the international community becomes a global community of free and equal states co-existing in a state of nature; individuals are excluded. War becomes self-help, but the idea of attempts at peaceful procedures, particularly arbitration, is introduced. From Pufendorf stems, we would add, in the last analysis, the dualistic doctrine.

In Wolff, who again adds positive international law and creates the *civitas maxima* as a scientific fiction, but stands against a real world state, the permissibility of war no longer depends on the justice of the cause,

but on compliance with certain procedural rules, a theory taken over by the League of Nations—what this reviewer has called the metamorphosis of the concept of *bellum justum* into that of the *bellum legale*. The balance of power plays a decisive rôle. The positivist doctrine, as it stood before World War I, coupled with the “progressive” theory, is analyzed by the author in Oppenheim’s *International Law*, first edition, 1912.

The second part traces the basic elements of the modern concept of world organization, which developed outside the science of international law: the liberal-democratic doctrine of reasonable standards of government, the theory of the harmony of men’s interest in peace, the natural harmony of reasonable economic interests (Locke, John S. Mill, Kant) and the nationality principle. To that has to be added the belief in “progress” (Comte’s *ordre et progrès*), the idea that material progress leads to world unity, and the belief in “world public opinion”; hence emphasis on education, freedom of press, no secret diplomacy. The combination of these ideas with international law is again exemplified in Oppenheim. A wonderful optimism ruled: progress will do the thing, the international community will become more legal and less political; hence no world state is either necessary or desirable.

The third part analyzes the basic and inherent contradictions on which the League of Nations was built; they can be briefly stated thus: the acknowledgment that a League of Nations is necessary supports the pessimistic view that ideal conditions have not yet been reached; and yet these ideal conditions would have had to exist, if the League, by voluntary co-operation of sovereign states, could have been able to achieve its tasks. But when the League came into existence, there was at least still a possibility to reason on “progressive” lines. But when the United Nations came into existence, events had negated all the hopes of the “progressives.”

While the author is neither optimistic nor pessimistic as to the future of mankind, he considers this analysis necessary and indispensable for clarifying current thinking on international organization. His analysis leads him to a rejection of the concept on which the United Nations is based. But he offers no proposals as to whether or how a world state shall be established. His theoretical investigation leads him only to the statement that it is senseless to speak of “the” world state, but only of a concrete type of world state. Another result of this theoretical investigation is that a world state cannot be established by international agreement, but only by political action, by the use of political power. A world state is not possible “by treaty,” but only by a change of fundamental conditions; it is not possible to have everything for nothing.

JOSEF L. KUNZ

The Present Law of War and Neutrality. By Erik Castrén. Helsinki: Annales Academiae Scientiarum Fennicae, 1954. pp. 632. Index. Finnish Mark 1800.

Renewed interest in the laws of war has led not only to a growing literature on basic problems of the laws of war, their development and revision,

but also to attempts to give a systematic exposition of the laws of war actually in force. Such attempts can be found in the most recent edition of the second volume of Oppenheim-Lauterpacht's *International Law* and in the work of Julius Stone, *Legal Controls of International Conflict*. To these attempts, the book under review also belongs. In the Preface the author takes a strong stand against what this reviewer has called the "chaotic status" of the laws of war and regrets that they have not been able to keep pace with the times: there are hardly any rules on aerial warfare; the law of economic and submarine warfare, the problem of booty, requisitions, guerrilla warfare, belligerent occupation, war crimes and of many other topics is uncertain.

The author wants, as the title indicates, to present a systematic view of the present law of war and neutrality; old controversies and obsolescent provisions superseded by more recent practice are only briefly referred to and only insofar as it is necessary to understand the modern law. The book is divided into three chapters: a small introduction (pp. 3-29), the Law of War (pp. 30-420), and the Law of Neutrality (pp. 421-601). The latter two chapters are each divided into four sections: general rules, warfare on land, on the seas, and in the air. Each paragraph is preceded by a bibliography, restricted to the more recent literature; but the latter is given fairly completely.

As to the basic attitudes and many details, the author's approach and reasoning are close to this reviewer's writings and his treatise of 1935 on this subject.

A brief consideration of the developments concerning the right to resort to war leads to the correct conclusion that war, however called, has not yet been successfully abolished; the author points to the weakness of the Kellogg Pact which also contains no sanctions provisions, to the failure of collective security, to the lack of a definition of aggression, to the paralysis of the United Nations Security Council; he points out that a successful abolition of war necessarily presupposes a procedure for the enforcement of claims against states not fulfilling their obligations, but abstaining from aggression, as well as a working procedure for peaceful change. All that as well as the enormously changed techniques of warfare which make rules, even where they exist, either outdated or disregarded by the belligerents, leads to the conclusion that the laws of war and their development and revision are and will remain a subject of great importance.

Equally, although recognizing that the law of neutrality since 1920 has entered a new phase of development and that limitations on the right to remain neutral have been established by treaty, the author points to the vigor which neutrality has nevertheless retained in the practice of states. This vigor is shown by the permanent neutrality of Switzerland and the neutrality of other states, by the conclusion of neutrality treaties and by the continuing importance of neutrality even under the U. N. Charter. We may add that even in the Korean action, as well as in the Indochina war, states Members of the United Nations were officially designated as "neutrals," and that the new Geneva Conventions of 1949 are wholly per-

vaded with the concept of neutrality and neutral Powers. Like this reviewer, the author holds that the new "non-belligerency" introduced by Italy is a wholly political, not a legal, concept. He reaffirms, like this reviewer, the rule of positive international law that the laws of war are binding on all belligerents, even in an unlawful war.

As far as basic considerations are concerned, the author maintains that violation of the laws of war as such does not create new rules; neither can the invocation of changed circumstances be an excuse for such violation. On the other hand, constant contrary practice can lead through desuetude to the disappearance or change even of treaty-created rules and to the formulation of new customary rules. Sometimes we can see merely a tendency toward the formation of new rules, even if, perhaps, these new rules are not yet definitively established; that is the author's stand concerning the deviation of merchant vessels into port for the purpose of visit and search (p. 351). Although recognizing that modern developments have shaken the basic distinction between combatants and the civilian population, the author stands for the continued protection of civilians and of objects which cannot be used for war purposes, "as the most remarkable achievement of the modern law of war." He holds, therefore, that bombardment for the purpose of terrorizing the civilian population, "although carried out extensively during the Second World War," is without doubt contrary to international law (p. 200). German V-2 rockets were illegal (p. 204), as were German magnetic mines (p. 267). He stands, even after Nuremberg, for the continued unlawfulness of unrestricted submarine warfare and for the continued validity of the London Protocol (p. 289). The establishment of war zones on the high seas is condemned, *de lege lata* and *de lege ferenda*, as an infringement of the rights of neutrals, as a violation of the principle of the freedom of the seas and as a means of a starvation blockade against the civilian population (p. 318). He holds the censoring of letters, except for the removal of contraband, to be contrary to the relevant Hague Convention (p. 343). He advises that arming of merchantmen even for purposes for self-defense ought not to be allowed (p. 251). He takes a strong stand against indiscriminate aerial bombing (p. 405) and holds that ruthless aerial bombardment, as executed during the Second World War, was illegal. He is very doubtful about the legality of atomic bombs, if used against cities (p. 206), although he holds that their use against soldiers and military targets is perfectly legal. On all these points, we find in recent literature very divergent and much "tougher" views, just as the author regrets the non-entry into force of the Hague Air Warfare Rules of 1923, whereas one other modern writer calls these same rules nothing but "legal fantasy."

On the other hand, the author holds that use of flame-throwers, incendiary bombs and bullets is "now generally accepted" (p. 190), just as is bombing of military targets in the hinterland of the enemy. Nor is the internment of civilians, since the first World War, contrary to international law, although it is judged from a meta-legal point of view to be "wholly retrograde."

It is not possible, within the framework of a book review, to point out or to criticize all the hundreds of problems dealt with in this book. The author has, with regard to every problem, carefully studied the practice of states in the two world wars and other recent wars, has worked in the Nuremberg and other war crimes trials and made full use of the new Geneva Conventions of 1949, also with regard to the law of belligerent occupation. The book is further characterized by its purely scientific, neutral, and impartial approach; it is not written to defend the practice of any particular state; even the Finnish attitude and practice are studied from an objective point of view. The need for a new system of laws of war in these times and the qualities of the work under review make it a book of the highest importance.

JOSEF L. KUNZ

A Half Century of International Problems. A Lawyer's Views. By Frederic R. Coudert. Edited by Allan Nevins. With an Introduction by Philip C. Jessup. New York: Columbia University Press, 1954. pp. xix, 352. \$4.00.

In introducing the "occasional papers of the senior partner" of "the well-known New York law firm which can now celebrate a century of legal work," "Professor Jessup, the present President of the American Society of International Law, cogently and accurately describes this volume of one of his predecessors in that office by stating that "When his literary and philosophical interests are broad and he possesses a charming wit, and when his practice and sense of public duty call him to deal with great issues of his time," the writings of a successful practicing lawyer make good reading.

Mr. Coudert began his experience with international law when he accompanied his father, one of the leading counsel for the United States, to the Bering Sea Arbitration at Paris in 1893. His "Reminiscences of James C. Carter," another of the leading counsel, give a vivid description of the argument brilliantly but unsuccessfully made on behalf of the United States to uphold its claim to jurisdiction over the fur seals beyond the three-mile limit.

Service as a volunteer officer in the Spanish-American War preceded Mr. Coudert's engagement as senior counsel in the *Insular Cases* before the Supreme Court of the United States. These cases involved the constitutional status of the Spanish islands and their inhabitants ceded to the United States by the Peace Treaty of 1898. Mr. Coudert's arguments were instrumental in formulating American jurisprudence on these questions.

As legal adviser to the British Embassy in the United States during World War I, Mr. Coudert became professionally interested in the neutrality laws of the United States. When the relations with the Allies became strained during that period, he, with the approval of the Secretary of State, visited London and Paris to confer with leaders of the British

and French governments on the delicate issues involved. He undertook "to be a buffer between the State Department and the Allied Governments and to absorb as much of the shock as possible." The results of his discussions were reported in a long letter to State Department Counselor Frank Polk, dated September 28, 1915, which is herein published for the first time.

Mr. Coudert became an ardent advocate of the League of Nations, and when, after World War I, Congress passed legislation making it practically impossible for any future belligerent to rely upon importations from the United States for its sinews of war, Mr. Coudert became an outspoken critic of the whole concept of neutrality and urged reliance upon collective security to avoid war. "I know that many may differ from my thesis and contend that we are entering into the domain of international politics rather than that of international law," he stated before the American Society of International Law in April, 1942:

To this I can only answer that the two are completely inseparable; to devise beautiful codes in a vacuum is a pleasant intellectual recreation, but it is not worth the time of the active, practical men who compose this Society and the American Bar Association.

International law and international relations, as our charter indicates, cannot be segregated in water-tight compartments. If the lawyers are to take the lead to which the traditions of their profession and their past influence entitle them, they must take a positive stand upon the problem of how to sanction international law. . . .¹

The scope and content of the many interesting cases and situations dealt with in these selected papers are indicated by their group classification: The law in an era of change, including, among other subjects, the regulation of corporations, riparian rights, and the Eighteenth Amendment; problems of an American empire; judicial reform, true and false; arbitration, international law and world peace, including heretofore unpublished correspondence with Admiral A. T. Mahan and John Bassett Moore; dangers and duties of neutral America; the League of Nations; totalitarian war and world order. Each group is introduced with an historical setting by the Editor. They are all significant of the history of the times to which Mr. Coudert bears witness as a keen and alert participant, as well as active practitioner and devoted advocate.

GEORGE A. FINCH

Comunicazioni e Studi. Vol. V. Istituto di Diritto Internazionale e Straniero della Università di Milano. Milan: A. Giuffrè, 1954. pp. viii, 674.

The Institute of International and Foreign Law of the University of Milan presents the fifth volume of its yearly publication. This volume, under the brilliant editorship of Professor Roberto Ago, is, as usual, beautifully printed and bound and highly valuable in its contents.

Large studies are devoted to the judgments of the International Court of Justice in 1952-53 (A. Migliazza, pp. 355-385), problems of interna-

¹ Proceedings of 36th Annual Meeting, April 25, 1942, p. 42.

tional law in Italian court decisions, 1952 (Capotorti, pp. 387-435), Italian jurisprudence in conflict of laws (Ziccardi, pp. 437-466), and recent tendencies in the Italian science of international law (G. Barile, pp. 467-496), and of conflict of laws (A. Malintoppi, pp. 497-566). The large department of book reviews (pp. 567-669) gives excellent reviews on new publications and on all the most important reviews in the fields of public and private international law.

There is also an article on international procedural law (A. Migliazza, pp. 231-268) and four studies on international law: G. Biscottini writes on international administration (pp. 109-140), G. Barile on the liberty of appreciation of international customary law by the international judge (pp. 141-229), Bentivoglio on the interpretation of the international judgment (pp. 269-282), and F. C. Gentile an ample investigation into the jurisdiction of the United Nations Security Council and General Assembly in the field of maintaining and re-establishing international peace and security (pp. 283-354). The volume opens with a long and learned investigation (pp. 1-107) in English on "British Nationality Law and the History of Naturalization," by Clive Parry.

JOSEF L. KUNZ

Recueil des Arbitrages Internationaux. Vol. III. By Albert de La Pradelle,³ Jacques Politis and André Salomon. Paris: Editions Internationales, 1954. pp. 859.

This momentous work is not only a highly commendable reference book to all those who are versed in international law and relations, it is also an act of faith for its principal editor, the great Old Man among the European internationalists, Professor Albert de La Pradelle. His foreword is dedicated mainly to the memory of his lamented friend and collaborator, Nicolas Politis, with whom he conceived the first volume of the *Recueil* in 1905, and the second in 1922. Differing from other digests of international arbitrations, which contained only the texts of judgments, their *Recueil* undertook to analyze and comment upon them, in order to formulate the general principles of the then nascent international law. It must be remembered that the first volume of the *Recueil* appeared when the Permanent Court of Arbitration was created, and the second when the Permanent Court of International Justice assembled at The Hague. And it can be ventured that the editors of the *Recueil* not only provided the first Court with documentation, but also helped to bring it into existence. Was not the law of nations quite a new branch of instruction, in subordinate relation to civil law, at the time when La Pradelle and Politis met at the French Law School? In their conception, writes La Pradelle, the law was to become "a discipline of life: life of peoples, life of nations, life of humanity; the all dominated by the finality of Man."

In his last will Nicolas Politis asked his son Jacques to continue the publication of the *Recueil*. And Mr. André Salomon became the third member of the editorial staff. However, a fourth volume of the *Recueil*!

³ Deceased February 2, 1955, in Paris.

is already in preparation, this time with the active participation of M. Paul de La Pradelle, who, like his father, is a professor of international law. And thus the task that had been undertaken a half-century ago is assured continuity.

The first volume of the *Recueil* ended with the judgments and treaties prior to 1855, the second with the year 1872. The present volume covers a period of four years and ends with the Gotesworth & Powell Affair between Great Britain and Colombia. Suffice it to say that even this case of relatively minor importance in the annals of arbitration is related and commented on through 42 pages. This is due to the method of presenting each case from a triple viewpoint: (1) of the evolution in arbitral procedure; (2) of its action upon the formation of law; (3) of the influence exerted by the arbitration on the peaceful settlement of conflicts between nations. The introduction to Vol. III tells us in an impressive recital the story of this evolution, and the chronological index records facts and events from the year 1313 to 1949.

The authors of the *Recueil* have always been staunch supporters of the peaceful settlement of international disputes and believers in the advent of an era of law and justice among nations. But they also maintain that arbitration and mediation need guarantees and sanctions if their decisions are to be respected. If the final act of justice is peace, the ultimate argument to carry it into effect is still the punishment of the offender against the law.

KAAREL R. PUSTA, SR.

Internationale Luftfahrtabkommen. By Alex Meyer. Köln-Berlin: Carl Heymanns Verlag, 1953. pp. xii, 416. Index. DM. 34.50.

The expected restoration of German sovereignty, with the concomitant removal of restrictions on German aviation activities, has revived in recent years the interest of Germans in air law. A periodical devoted to the subject, *Zeitschrift für Luftrecht*, began to appear in 1952 under the editorship of Dr. Alex Meyer, a well-known air law specialist. Since Germany took no part in the preparation of the Chicago Convention of 1944 or other postwar multilateral aviation treaties, and has not as yet become a party to any of them, the texts of many of these instruments were not readily available in Germany, especially in German translations, until the appearance of Dr. Meyer's hand compilation. It also contains the prewar conventions on private air law, the IATA "general conditions of carriage" of 1939, the International Sanitary Regulations of 1951, the provisions concerning aviation in the 1952 agreements between West Germany and the Western Allied Powers (which have shared the fate of the EDC Treaty), and related documents. The German translations of the texts are accompanied by valuable historical and doctrinal notes which—with respect to such matters as the proposed revision of the Warsaw Convention and the law of outer space—are prospective as well as retrospective in character. Perhaps the value of the publication would

have been even greater had the editor inserted translations of some typical bilateral air transport agreements, many provisions of which have become standardized; but even in their absence, this handbook, printed in small type and small format, will be of help to lawyers, officials, students, and aviation specialists in all German-speaking countries.

OLIVER J. LISSITZYN

In the Cause of Peace: Seven Years with the United Nations. By Trygve Lie. New York: Macmillan Co., 1954. pp. xvi, 474. Index. \$6.00.

The first Secretary General of the United Nations, Trygve Lie, has completed a volume of recollections dealing with questions which concerned him during seven years. The fact that he was able to use official documents and memoranda, notes and letters, makes this volume of recollections very useful and important. Students of international relations and the general reader, whom Mr. Lie calls the ordinary man and woman in all countries, will welcome this work which makes its appearance at an opportune time.

Lack of space and time reduced the contents beyond a point the former Secretary General desired. Such political questions as Kashmir, Indonesia, and the Italian colonies are not discussed; activities of both the Economic and Social Council and the Trusteeship Council are covered in less than desirable detail, he frankly admits. Consideration of many administrative problems was omitted. Mr. Lie does express a hope that there may be "an opportunity to deal with them all later, in one way or another." A second volume, or perhaps a series of volumes, would be useful—especially if the approach and manner of handling content is similar to that employed in this first work.

What, then, did Mr. Lie recall and what did he include in the fourteen chapters of *In the Cause of Peace*? First, in several chapters, he has related the story of how he became Secretary General of the United Nations, his rôle in the formative years of the Organization, and how he worked to establish the Organization in permanent headquarters. Secondly, he has recounted the background of the extension of his term beyond the first five-year period and the circumstances of his resignation in 1952.

The former Secretary General laid great emphasis upon the constitutional powers of the office; these he endeavored to uphold and strengthen, feeling certain that the United Nations would need them in the critical times facing the Organization. In his opinion the Organization should be represented by a Secretary General respected by all the Member governments. Only then could the Secretary General wield "constitutional powers with the greatest degree of influence and prestige."

Not the least interesting is Mr. Lie's account of his Peace Mission in 1950. In the course of the mission the then Secretary General visited Washington, London, Paris, Prague and Moscow in an effort to find a solution of the problem of Chinese representation, and to restore the United

Nations as a meeting place for discussion of issues. At this time Mr. Lie noted that the Western Powers and Moscow had not had "any significant diplomatic contact" with each other. All the resources of leadership and planning were being devoted to short-range projects and alliances, whereas the long-range objective—the ultimate peaceful settlement of the cold war—was being slighted. He concluded that what was needed, what the world needed, was a twenty-year program to win peace through the United Nations. Actual details of such a long-range program were spelled out in a memorandum which Mr. Lie has included and the reception to the ideas therein set forth in some detail. The advent of the Korean War, however, made it quite impossible to achieve the original and main objective. Writing as he did in 1954 and in a detached part of the world, he concluded that "steps toward a lasting peace will have to follow the broad outline set forth on June 6, 1950, whenever and wherever they can be taken."

Mr. Lie was in retirement when the Korean Truce was signed on July 27, 1953. He chose that occasion to issue a statement commending the sixteen Member nations for their part in the Korean affair, which he has described as a "successful stand." In the course of that venture collective security was enforced, the first time in the whole of human history it had been possible to do so. Some persons will take exception to this statement.

In the final chapter, Peace—with Freedom, Mr. Lie makes a case for the United Nations with these words: "Every forward step toward increased clarity regarding the United Nations Charter and its practical day-to-day application will serve interests of peace." It is a philosophy of peace with freedom.

MARY E. BRADSHAW

Organizing for Peace: International Organization in World Affairs. By Daniel S. Cheever and H. Field Haviland, Jr. Boston: Houghton Mifflin Co., 1954. pp. x, 918. Index. \$7.00.

This combination textbook and essay, smoothly written, aims to present a continuum of the League of Nations and United Nations systems together with the parallel multilateral developments of the present era. The book is adequately comprehensive and wide-ranging in restrained interpretation to serve well in the courses on international relations which are so popular. The structure, authority, and work of the League of Nations and the United Nations, their organs and ancillary organizations, are set forth in nearly 700 pages, regional and other systems in 100 pages, with the objective of showing them as "channels through which governmental and nongovernmental interests operate" in the political, economic, and social fields. From the proper books and a restricted selection of documents (recorded with each chapter) the authors have derived good sketches of multilateral relations in their present setting. The book addresses itself both to the student and to the citizen.

DENYS P. MYERS

Empire by Mandate: A History of the Relations of Great Britain with the Permanent Mandates Commission of the League of Nations. By Campbell L. Upthegrove. New York: Bookman Associates, 1954. pp. 240. Index. \$3.50.

In some one hundred and sixty pages of text—the remainder of the book consists of notes, a bibliography, and an index—the author first presents a sketch of the emergence of the Mandate system and of the establishment of the Permanent Mandates Commission. This is followed by a discussion of the general problems affecting the mandated territories of Great Britain with which the Permanent Mandates Commission had to deal: the national status of the inhabitants of mandated territories; the loans to, and the private investments in, these territories; the purchase of supplies by mandate administrations; the treatment in League of Nations countries of persons and goods coming from mandated territories; the application of international conventions to, the military recruiting in, and the liquor traffic with, these territories; the modification of mandate boundaries; the petitions from the mandated territories and the form of the Commission's questionnaire. Finally, in about one half of the text, the problems germane to the several British mandated territories (Nauru, British Togoland, British Cameroons, Tanganyika, Iraq, and Palestine), and their treatment by the Permanent Mandates Commission are covered.

The manuscript of the book was completed in 1941. Astonishingly, when published thirteen years later, not the slightest change of, or additions to, the manuscript were made. Not even a new preface was written to explain this or the delay in publication. Assuming that the substance of the manuscript needed no revision, surely the bibliography, which covers sixteen pages of the book, should have been brought up to date. The text, too, would have benefited by a revision. It contains some sentences that convey no meaning, needless repetitions, contradictions, and inaccuracies. Thus, Lord Hankey who succeeded Lord Hailly on the Permanent Mandates Commission in May, 1939, was not the last representative of British nationality on the Commission, as seems to appear from the text (p. 29); he in turn was again replaced by Lord Hailly in December, 1939. Also, to give another example, the statement in the preface that Article 22 of the Covenant of the League of Nations "envisaged an eventual termination of the mandates and the recognition of their independent status," is, to say the least, an overstatement. For the "B" and "C" mandates—in contrast to the "A" mandates—independence was not explicitly ordained by the Covenant; it was rather the Permanent Mandates Commission that assumed that independence was the goal for all mandates.

The subtitle, rather than the title, *Empire by Mandate*, is descriptive of the book, for the reader will look in vain for any statement of wider political implication. Written by the former head of the Department of History of Texas Southern University, it will be useful for those who want to be informed of the relations of Great Britain with the Permanent Mandates Commission of the League of Nations.

GEORGE V. WOLFE

Osteuropa und der deutsche Osten. Vol. I: Die Oder-Neisse-Linie. Eine volkerrechtliche Studie. By Herbert Kraus. Köln-Braunfeld: Verlagsgesellschaft Rudolf Mueller, 1954. pp. 48. DM. 3.80.

This slim brochure, developed from a lecture by the Director of the International Law Institute at the University of Goettingen, is a representative sample of the prodigious amount of research and publication currently issuing from West German universities, institutes, and study groups, in which the tools of scholarship are used in support of national claims and grievances. One of the most palpably painful results of the lost war for Germany was the acquisition by Poland of a large slice of German territory apparently as compensation, at the expense of the defeated enemy, for the loss of territory east of the Curzon Line to the Soviet ally. Professor Kraus very properly points out that Poland's remote historical claims were not very serious and that at Teheran, Yalta, and Potsdam legal considerations played no rôle whatsoever (p. 14). He nevertheless undertakes to discuss the transfer of the territory in the light of international law, by posing four specific questions: (1) Is annexation or similar (presumably: unilateral) disposition of territory of a defeated enemy forbidden by international law? (2) Is a plebiscite necessary in order to make a transfer of territory legal? (3) Did the signers of the Atlantic Charter bind themselves legally to renounce territorial acquisitions, with or without plebiscite? (4) Did the Soviet Union, by certain unilateral measures, violate undertakings toward her allies, particularly those made at the Potsdam Conference? After a rather sketchy review of the issues raised, the author finds to his satisfaction that the actions of the Soviet Union and of Poland with respect to the territories beyond the Oder-Neisse line violate a ban on annexation recognized by international law; that the same actions violate the principle of self-determination of nations; that they violate the Atlantic Charter; that they are an infraction of the obligations undertaken by the Soviet Union (and Poland) as members of the victorious coalition. In the light of the author's own demonstration of the power-political nature of the decisions affecting Germany's boundary, it is not quite clear to this reviewer what is gained by the type of legal analysis offered by Professor Kraus, unless the argument serves to reinforce the feeling of the Germans that justice is on their side. This would be quite consistent with the point made at the beginning of the study that as long as the German people do not reconcile themselves to the changes, the mere fact of possession and the mere passage of time cannot create for Poland a valid title to the former German lands. On closer examination, the real source of comfort to the author seems to be the fact that the West has thus far declined to consider the transfer as final. Another source of hope for at least some Germans, not mentioned by the author but frequently discussed by others, is that under certain circumstances the Soviet Union, which is in a position to do so without war, might consider it expedient to hold out to some future German Government the prospect of returning the area now held by Poland.

SAMUEL L. SHARP

The Middle East: Problem Area in World Politics. By Halford L. Hoskins. New York: Macmillan Co., 1954. pp. vi, 312. \$4.75.

This book, dealing with the Middle East in its world setting, is intended not only for students of Middle Eastern affairs but also for all those interested in world affairs generally. Its author, a specialist in Middle Eastern as well as international affairs, has analyzed the internal factors and forces that produced Middle Eastern problems without ignoring their bearing on the larger issues resulting from the present East-West conflict. The book is authoritative, lucid, and clearly written, and provides meat for thought. It is not merely a factual exposition of events but above all is an interpretation of the internal tension of a region beset with clashing loyalties and interests, amply described in the book's subtitle as a "Problem Area in World Politics."

The book is arranged topically. The first chapter introduces the reader into the subject by an excellent summary on the historical and geographical significance of the Middle East. It is followed by a chapter on Turkey, the Straits, and the "Cold War." Two chapters are devoted to what proved to be the most controversial Middle East issue, namely, the Suez Canal Zone, the solution of which—as foreseen by the author—proved to be a compromise satisfactory to Egyptian national pride. The problems of the Sudan, Israel, and Iran are each treated in separate chapters. The impact of the Palestine war on inter-Arab politics is discussed in two chapters. The significance of Middle East oil is treated in two chapters; Point Four and technical assistance in one chapter; and the problem of the defense of the Middle East, its relation to NATO, and the rôle of the Middle East in East-West conflict in two chapters.

Dr. Hoskins paints with a broad brush, but his facts and interpretations could hardly be challenged. He enriches his arguments by constant references to the historical origin of each problem; for no other region is more the product—as well as the victim—of its history than the Middle East. The author has also made full use of his own personal experiences and extensive travels throughout the Middle East (his last trip, as he has indicated in the Preface, was made for the purpose of checking the accuracy of certain facts). His two chapters on the Suez Canal, based in part on his *British Routes to India*, are masterly studies not likely to be superseded soon. This high standard set by Dr. Hoskins has not been maintained in the chapter on Iran. Nor is the chapter on Israel likely to satisfy all Arabs and Zionists—indeed a detached treatment can satisfy the extremists of neither group. The discussion on the strategy of oil and strategic significance of the Middle East is realistic, and the author's advice for a cautious and unilateral approach to Middle East defense seems to be the wise course which the United States has recently decided to follow.

If this review appears to be very favorable, it is because the present writer agrees with the conclusions of the author and finds no serious error in a level-headed study on which Dr. Hoskins is to be congratulated.

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International Law Documents, 1952-53. U. S. Naval War College. Washington: Government Printing Office, 1954. pp. vi, 340. \$3.00.

The 48th volume of the series of Naval War College publications begun in 1894 contains a collection of texts of postwar treaties and related documents pertaining to international co-operation in the military, economic, and political fields, principally with respect to Europe. It was prepared with the collaboration of Judge Manley O. Hudson, of Harvard Law School, former Associate for International Law of the Naval War College.

The volume is divided into three sections dealing with international political, military and economic agreements, respectively.

Section I on peace treaties concluded in 1951 and 1952, contains the texts of the Japanese Peace Treaty of September 8, 1951, two of the Bonn Conventions of May 26, 1952, often referred to as the "Contractual Agreements" with Germany, and related agreements and declarations. It includes the texts of the Declaration of September 25, 1951, by the United States, France and the United Kingdom, and the exchange of notes between the United States and Italy of December 8/21, 1951, on the lifting of certain restrictions and discriminations imposed upon Italy by the Peace Treaty of 1947. Also included is the text of the Agreement for the Settlement of Disputes arising under Article 15 (a) of the Japanese Peace Treaty (return of Allied property in Japan during the war), signed in Washington on June 12, 1952.

The conventions concluded at Bonn between the Three Powers (United States, Great Britain and France) and the Federal Republic of Germany which are reproduced in this volume comprise the Convention on Relations, with Annexes, and the Convention on the Rights and Obligations of Foreign Forces and their Members in Germany, with Annexes. The text of the Agreement on the Tax Treatment of the Foreign Forces and their Members in Germany is included in the collection, along with exchanges of letters regarding production of atomic weapons and civil aircraft. There is also included the Declaration on Berlin made by the Allied Kommandatura on May 26, 1952. The Bonn Conventions and notes not textually included are briefly summarized.

Section II, covering defense agreements, includes the texts of the North Atlantic Treaty of April 4, 1949, the Treaty Constituting the European Defense Community (EDC) of May 27, 1952, treaties and agreements related to these two pacts, and the Pacific area security treaties. There are reproduced agreements between the United States and Iceland, Denmark, Portugal, Spain and Greece, made pursuant to the North Atlantic Treaty, and the Protocol on Guarantees given by the Parties to NATO to the Members of the European Defense Community, as well as the Treaty between the United Kingdom and the Member States of EDC, the Agreement of April 13, 1954, regarding Co-operation between the United Kingdom and the EDC, and the message of the President of the United States of April 16, 1954, stating the United States position on the relation between the EDC and NATO. There are also printed the additional protocols to the EDC Treaty drawn up at Paris on March 24, 1953.

The documents relating to the Pacific area include the texts of the Mutual Defense Treaty of August 30, 1951, between the United States and the Philippines, the Security Treaty of September 8, 1951, between the United States and Japan, and the Security Treaty of September 1, 1951, between the United States, Australia and New Zealand (ANZUS).

The third section on European unions contains the texts of amendments made in 1951 to the Statute of the Council of Europe, the General Agreement on Privileges and Immunities of the Council, and the Treaty of April 18, 1951, Constituting the European Coal and Steel Community, with related protocols. Explanatory notes covering the Benelux Union, 1944 and 1947, the United Nations Economic Commission for Europe, the Organization for European Economic Co-operation, the European Payments Union, the Western Union (Brussels Pact of 1948), the Council of Europe, and the European Political Community, complete the material in this section.

Each of the three sections contains an introductory note on the subject treated, giving the status of the documents and relevant developments thereon. In addition, each document reproduced is preceded by notes containing supplementary information on the status of the agreement (ratifications, effective date, etc.) and the official source of the document.

A number of the documents presented are not in force and some of them have been modified by the agreements concluded at London and Paris in September and October, 1954. As pointed out, however, in the preface, by Rear Admiral Robbins, President of the Naval War College, these documents "are nevertheless reproduced in this collection because of their great importance." The volume is a useful and important reference book, showing how unified action in the international political, economic, and military fields may be planned and developed in the face of harsh necessity.

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tions Unies (1950-1953) (pp. 243-298), Georges Langrod; *I Lavori della Commissione per il Diritto Internazionale delle Nazioni Unite* (pp. 299-322), Antonio Ruini; *Il Consiglio Nordico* (pp. 323-339), A. Maresca; *La Questione dell'Oro della Banca Nazionale d'Albania avanti la Corte Internazionale di Giustizia* (pp. 352-365); *Sulla revisione delle Sentenze del Tribunale italiano delle Prede* (pp. 371-379), Benedetto Conforti; *Su la Natura dei Matrimoni Celebrati all'Esterio in Forma Canonica* (pp. 394-401), Francesco Durante; *Contratti d'Arruolamento su Nave Straniera Stipulati in Italia e Giurisdizione Italiana* (pp. 407-411), Ludovico Matteo Bentivoglio.

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vatrecht (pp. 401-426), Wilhelm Wengler; *Das Recht des Warenkaufs im Amerikanischen Uniform Commercial Code* (pp. 427-462), Ingeborg Ruprecht; *Interzonale Kollisionsnormen in der Gesetzgebung Deutschlands* (pp. 462-476), Ulrich Drobnig; *Die Rechtsprechung des Schweizer Bundesgerichts auf dem Gebiete des Privatrechts 1948-1951* (pp. 476-509), Ernst Brand; *Gesetzgebung der Niederlande auf dem Gebiete des Privatrechts 1940-1953* (pp. 516-538), Georg Czapski; *Die Australische Gesetzgebung auf dem Gebiete des Privatrechts 1939-1953* (pp. 538-553), Johannes Leyser.

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OFFICIAL DOCUMENTS

CONTENTS

	Pa
GREECE-TURKEY-YUGOSLAVIA. Mutual Assistance Pact. <i>Bled, August 9, 1954</i>	
ARAB LEAGUE. Joint Defense and Economic Co-operation Treaty. <i>Cairo, April 13, 1950</i>	

GREECE-TURKEY-YUGOSLAVIA MUTUAL ASSISTANCE PACT

Signed at Bled August 9, 1954.¹

PREAMBLE

The contracting parties reassert their fidelity to the principles enunciated in the United Nations Charter and their desire to contribute, by uniting their efforts, to the safeguarding of peace, to the consolidation of security and to the developments of international cooperation.

Resolved to insure, in the most efficacious manner, the territorial integrity and political independence of their countries, in conformity with the principles and the clauses of the United Nations Charter:

Inspired by the desire to extend and strengthen the basis of friendship and cooperation laid down by the treaty of friendship and cooperation, signed on Feb. 28, 1953, at Ankara, between the countries, which has asserted itself as an extremely efficacious instrument:

Keeping in view the fact that the above-mentioned treaty was always conceived as the first step towards an alliance:

Considering that the realization of such an alliance is necessary, convinced that in any case the institution of a system of collective security between them through the conclusion of a treaty of alliance would constitute not only a decisive factor for their own security and independence, but would also be beneficial for all other countries devoted to the cause of a just peace, especially for those situated in their region:

We have decided to conclude the present treaty, and to this end have designated as respective plenipotentiaries;

His Majesty the King of the Hellenes—His Excellency M. Stephen Stephanopoulos, Minister of Foreign Affairs;

The President of the Turkish Republic—His Excellency Prof. Fuad Koprulu, Minister of Foreign Affairs;

The President of the Federative People's Republic of Yugoslavia—His Excellency M. Koca Popovic, State Secretary for Foreign Affairs;

Who, after having presented their credentials, which have been found to be in proper and adequate form, have agreed on the following:

(1)

The contracting parties commit themselves to settle, in conformity with the provisions of the United Nations Charter, by peaceful means, all international disputes in which they might be involved and to abstain in their international relations from resorting to the threat or use of force

¹ Reprinted from *News from Turkey* (Turkish Information Office), Vol. 7, No. 22 (Aug. 12, 1954).

in any way which would be incompatible with the aims of the United Nations.

(2)

The contracting parties have agreed that any armed aggression against one, or several of them, at any part of their territories, shall be considered as an aggression against all the contracting parties, which, in consequence, exercising the right of legitimate collective defense, recognized by Article 51 of the United Nations Charter, shall individually or collectively render assistance to the party or parties attacked, undertaking in common accord and immediately all measures, including the use of armed force, which they shall deem necessary for efficacious defense.

The contracting parties, with the reserve of Article 7 of the present treaty, commit themselves not to conclude peace or any other arrangement with the aggressor unless they should have previously reached common accord among themselves.

(3)

With the purpose of insuring, in a lasting and efficacious manner, the realization of the objects of the present treaty, the contracting parties have undertaken the obligation to extend to each other mutual assistance in order to maintain and strengthen their defensive capacity.

(4)

With the purpose of insuring an efficacious application of the present treaty the following has been decided:

A. To establish a permanent council composed of the foreign ministers and of such other members of the Governments of the contracting parties, whose presence might be deemed necessary according to the requirements of the situation and the nature of the matters under examination.

The permanent council would be convened regularly twice a year. It could also hold additional meetings whenever the Governments of all contracting parties consider it necessary. When not in session, the permanent council would exercise its functions through the intermediary of the permanent secretariat of the Ankara treaty, in a manner to be determined.

The conference of the ministers of foreign affairs, provided for by Article 1 of [the] Ankara treaty, is replaced by the permanent council.

Decisions on essential questions will be passed in unanimity by the permanent council.

B. The General Staffs of the contracting parties shall continue their joint work started in conformity with the Articles 2 and 3 of the Ankara agreement, taking into account the provisions of the present treaty.

(Article 2 of the Ankara treaty declares that "the contracting parties intend to continue their common efforts to safeguard peace and security in their area, and to examine jointly the problems of their security, in-

cluding common defensive measures that may be rendered necessary in the event of an unprovoked attack against them." Article 3 says the General Staffs of the contracting parties "shall continue their cooperation with a view to submitting to their Governments recommendations on defense questions defined by common agreement, so that coordinated decisions may be made.)

(5)

In the event that the situation envisaged by Article 2 of the present treaty should occur, the contracting parties would immediately undertake mutual consultations and the permanent council would meet urgently to determine the measures that should be jointly undertaken, in addition to those already taken on the grounds of Article 2 to meet the situation.

(6)

In the event of a grave deterioration of the international situation, and especially in the areas where such deterioration could have negative effect, direct or indirect, upon the security in their area, the contracting parties shall consult each other with a view to examining the situation and determining their attitude.

The contracting parties, conscious that an armed aggression against a country other than themselves could be extending, directly or indirectly a threat to the integrity of one or several of them, have agreed on the following:

In the event of an armed aggression against a country toward which one or several of the contracting parties should at the moment of the signing of the present treaty have undertaken obligations of mutual assistance, the contracting parties will consult each other on the measures to be taken, in conformity with the aims of the United Nations, to meet the situation that would have thus been created in their area.

It is understood that consultations provided for under this article could also include an urgent meeting of the permanent council.

(7)

The contracting parties shall immediately inform the United Nations Security Council of armed aggression of which they are victims and of the measures undertaken for legitimate defense. They shall halt the aforementioned measures when the Security Council has effectively applied the measures mentioned in Article 51 of the United Nations Charter.

Similarly, the Governments of the contracting parties shall, without delay, make the declaration foreseen by the resolution of the United Nations General Assembly on Nov. 17, 1950, on the duties of states in the case of an outbreak of hostilities and shall act in conformity with the afore-mentioned resolution.

(8)

The contracting parties reiterate their decision not to participate in any coalition directed against one of them, and not to undertake any commitments incompatible with the provisions of the recent treaty.

(9)

The provisions of the present treaty do not affect, and cannot be interpreted as affecting in any way, the rights and obligations arising for the contracting parties from the United Nations Charter.

(10)

The provisions of the present treaty do not affect, and cannot be interpreted as affecting in any way, the rights and obligations that arise for Greece and Turkey from the North Atlantic Treaty of April 4, 1949.

(11)

The treaty of friendship and cooperation concluded between the contracting parties in Ankara on Feb. 28, 1953, remains in force in so far as it has not been altered by the provisions of the present treaty. The contracting parties are agreed that in regard to the duration of the Ankara treaty, the provisions of Article 13 of the present treaty shall be applied.

(12)

The provisions of Article 9 of the treaty of friendship and cooperation of Feb. 28, 1953, shall be applicable to the present treaty under the same conditions.

(Article 9 of the Ankara agreement provides that any other state "whose cooperation may be considered by all the contracting parties as useful for the achievement of the aims of the present treaty" may be admitted).

(13)

The present treaty has been concluded for a period of twenty years. If none of the contracting parties should cancel it one year before its term has expired, the treaty shall be considered as tacitly prolonged for another year, and so forth, until canceled by one of the contracting parties.

(14)

The present treaty will be ratified by the contracting parties in conformity with their respective constitutional regulations. It will come into force on the day on which the last ratification instruments have been deposited.

The treaty has been enacted in French in three identical copies, one of which has been presented to each of the contracting parties; in conformity with which the plenipotentiaries of the contracting parties have placed their signatures to it.

JOINT DEFENCE AND ECONOMIC CO-OPERATION TREATY
BETWEEN THE STATES OF THE ARAB LEAGUE

Signed at Cairo April 13, 1950.¹

THE GOVERNMENT'S OF:—

H.M. THE KING OF HASHEMITE KINGDOM OF JORDAN.
H.E. THE PRESIDENT OF THE SYRIAN REPUBLIC.
H.E. THE KING OF THE IRAQI KINGDOM.
H.M. THE KING OF THE SAUDI ARABIAN KINGDOM.
H.E. THE PRESIDENT OF THE LEBANESE REPUBLIC.
H.M. THE KING OF THE KINGDOM OF EGYPT.
H.M. THE KING OF THE KINGDOM OF YEMEN.

In view of the desire of the above mentioned Governments to consolidate the relations between the States of the Arab League, to maintain their independence and their mutual heritage, to fulfill the desire of their peoples to rally in support of mutual defence and to maintain security and peace according to the principles of both the Arab League Pact & the United Nations Charter, and in conformity with the aims of the said Pacts and to consolidate stability and security and provide means of welfare and construction in their countries.

The following governments delegate

Having been duly accredited and fully authorised by their respective governments approve the following:

ARTICLE 1

In an effort to maintain and stabilize peace and security, the contracting States hereby confirm their desire to settle their international disputes by peaceful means, whether such disputes concern their own relations or those with other Powers.

ARTICLE 2

The contracting States consider any act of armed aggression made against any one or more of them or against their forces, to be directed against them all, and therefore in accordance with the right of legal defence, individually and collectively they undertake to hasten to the aid of the State or States against whom such an aggression is made, and to take immediately, individually and collectively, all means available including the use of armed force to repel the aggression and restore security and peace. And, in conformity with Article 6 of the Arab League Pact and Article 51 of the United Nations Charter, the Arab League Council and U.N. Security Council should be notified of such act of aggression and the means and procedure taken to check it.

¹ Reprinted from Egyptian Society of International Law, Brochure No. 13, April, 1952, pp. 18-21.

ARTICLE 3

At the invitation of any of the signatories of this Treaty, the contracting States should hold consultations whenever there are reasonable grounds for the belief that the territorial integrity, the independence or security of any of the parties is threatened. In the event of the risk of war or the existence of an international emergency, the contracting States should immediately proceed to unify their plans and defensive measures as the situation may demand.

ARTICLE 4

Desiring to implement the above obligations and to fully and effectively carry them out, the contracting States will cooperate in consolidating and coordinating their armed forces and will participate according to their resources and needs in preparing the individual and collective means of defence to repulse the armed aggression.

ARTICLE 5

A Permanent Military Commission composed of representatives of the General Staffs of the forces of the contracting States is to be formed to coordinate the plans of joint defence and their implementation. The powers of the Permanent Military Commission, as set forth in an annex attached to this Treaty, include the drafting of the necessary reports, covering the method of cooperation and participating mentioned in Article 4. The Permanent Military Commission will submit to the Joint Defence Council, provided hereunder in Article 6, reports dealing with questions within its province.

ARTICLE 6

Under the control of the Arab League Council shall be formed a Joint Defence Council to deal with all matters concerning the implementation of the provisions of Articles 2, 3, 4 and 5 of this Treaty. It shall be assisted in the performance of its task by the Permanent Military Commission referred to in Article 5. The Joint Defence Council shall consist of the Foreign Ministers and the Defence Ministers of the contracting States, or their representatives. Decisions taken by a majority of two thirds shall be binding on all the contracting States.

ARTICLE 7

In order to fulfill the aims of this Treaty and to bring about security and prosperity in Arab countries and in an effort to raise the standard of life therein, the contracting States undertake to collaborate for the development of their economic conditions, the exploitation of their natural resources, the exchange of their respective agricultural and industrial products, and generally to organise and coordinate their economic activities and to conclude the necessary inter-Arab agreements to realise such aims.

ARTICLE 8

An Economic Council consisting of the Ministers in charge of economic affairs, or their representatives if necessary, is to be formed from the contracting States to submit recommendations for the realisation of all such aims as are set forth in the previous article. This Council can, in the performance of its duties, seek the cooperation of the Committee for Financial and Economic Affairs referred to in Article 4 of the Arab League Pact.²

ARTICLE 9

The annex to this Treaty shall be considered as an integral and indivisible part of it.

ARTICLE 10

The contracting States undertake not to conclude any international agreements which may be contradictory to the provisions of this Treaty nor to act, in their international relations, in a way which may be contrary to the aims of this Treaty.

ARTICLE 11

No provisions of this Treaty shall in any way affect nor is intended to so affect any of the rights or obligations accruing to the contracting States from the United Nations Charter or the responsibilities borne by the U.N. Security Council for the maintenance of international peace and security.

ARTICLE 12

After the lapse of 10 years from the date of the ratification of this Treaty, any one of the contracting States may withdraw from it providing 12 months' notice is previously given to the General Secretariat of the Arab League. The League Secretariat General shall inform the other contracting States of such notice.

ARTICLE 13

This Treaty shall be ratified by each contracting State according to the constitutional status of its particular government. The Treaty shall come into force 15 days after the receipt by the Secretariat General of the ratification from at least four States. This Treaty of which one copy is to be deposited in the Secretariat General of the Arab League is written in Arabic in Cairo on April 30, 1950 [*sic.*] Further copies equally authentic shall be transmitted to each of the contracting States.

MILITARY ANNEX

1. The Permanent Military Commission provided for in Article 5 of the Joint Defense and Economic Cooperation Treaty between the States of the Arab League, shall undertake the following:—

² Printed in this JOURNAL, Supp., Vol. 39 (1945), p. 266.

(a) In cooperation with the Joint Defence Council, the preparation of all military plans to face possible armed aggression.

(b) To submit proposals for the organisation of the forces of the contracting States fixing a minimum force for each in accordance with military exigencies and the potentialities of each State.

The preparation of Military Plans to face all anticipated dangers or armed aggression that may be launched against one or more of the contracting States or their forces, such plans to be based on foundations decided by the Joint Defence Council.

(c) To submit proposals for the reorganisation of the forces of the contracting States in so far as their equipment, organisation and training are concerned so that they may keep pace with modern military methods and developments, and for the unification and coordination of all such forces.

(d) To submit proposals for the exploitation and coordination of the natural agricultural and industrial resources of all contracting States in favour of the inter-Arab military effort and joint defence.

(e) To organise the exchange of missions between the contracting States for the preparation of plans, participation in military exercises and manœuvres and the study of their results, for the recommendation of the improvement of methods to ensure close collaboration in the field, and for the general improvement of the forces of all contracting States.

(f) The preparation of the necessary data on the resources and military potentialities of each of the contracting States and the part to be played by its forces in the joint military effort.

(g) Study of the facilities and the contributions of each of the contracting States operating in its territory in conformity with the provisions of this Treaty.

2. The Permanent Military Commission may form temporary or permanent sub-committees from among its own members to deal with any of the matters falling within its jurisdiction. It may also seek the advice of any whose views on certain questions may be deemed necessary.

3. The Permanent Military Commission shall submit detailed reports on the results of its activities and studies to the Joint Defence Council provided for in Article 6 of this Treaty, as well as an annual report giving full particulars of its work and studies during the year.

4. The Permanent Military Commission shall establish its headquarters in Cairo but may hold meetings in any other place. The members shall elect a chairman for two years. Candidates for the presidency should hold at least the rank of General. All members of the Commission must hold the original nationality of one of the contracting States.

5. In the event of war, the general command of the joint forces shall be entrusted to the contracting State possessing the largest military force taking actual part in the field operations unless, by unanimous agreement, the Commander-in-Chief is selected otherwise. The Commander-in-Chief will be supported in the direction of military operations by a Joint Staff.

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 49

July, 1955

NO. 3

CONTENTS

	PAGE
THE UNITED NATIONS SECRETARIAT—SOME CONSTITUTIONAL AND ADMINISTRATIVE DEVELOPMENTS. <i>Maxwell Cohen</i>	295
THE CHINESE RECOGNITION PROBLEM. <i>Quincy Wright</i>	320
STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW. <i>F. V. García-Amador</i>	339
SOME RECENT FRENCH DECISIONS ON THE RELATIONSHIP BETWEEN TREATIES AND MUNICIPAL LAW. <i>Louis C. Bial</i>	347
EDITORIAL COMMENT:	
The Hydrogen Bomb Tests and the International Law of the Sea. <i>Myres S. McDougal</i>	356
Executive Agreements and Emanations from the Fifth Amendment. <i>Covey T. Oliver</i>	362
“Treaty-Investor” Clauses in Commercial Treaties of the United States. <i>Robert E. Wilson</i>	366
Pluralism of Legal and Value Systems and International Law. <i>Josef L. Kunz</i>	370
The Realist Theory in Pyrrhic Victory. <i>Myres S. McDougal</i>	376
NOTES AND COMMENTS:	
Resignation of Editor-in-Chief of the <i>Journal</i>	379
Commission and Advisory Committee on International Rules of Judicial Procedure. <i>Harry LeRoy Jones</i>	379
Jamming and the Protection of Frequency Assignments. <i>George A. Coddington, Jr.</i>	384
International Bar Association. <i>Gerald J. McMahon</i>	388
Annual Award Conferred on Judge Charles De Visscher	389
The Manley O. Hudson Medal	389
Eighth Annual Summer Institute on International Law	390
Annual Meeting of the Society. <i>Eleanor H. Finch</i>	392
Albert De Geouffre de La Pradelle P. B. P.	395
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>Oliver J. Lissitzyn</i>	396
BOOK REVIEWS AND NOTES:	
Oppenheim, <i>International Law</i> Vol. I: <i>Peace</i> (8th ed.), 426; Stone, <i>Legal Controls of International Conflict</i> , 428; Pereña Vicente, <i>Teoría de la Guerra en Francisco Suárez</i> , 429; British Ministry of Defense, <i>Treatment of British Prisoners of War in Korea</i> , 431; Cocca, <i>Instrumentos Internacionales: Aspectos jurídicos y aportes de la diplomacia</i> , 432; Carroz and Probst, <i>Personnalité juridique internationale et Capacité de conclure des Traités de l'O.N.U. et des Institutions spécialisées</i> , 432; Halle, <i>Civilization and Foreign Policy</i> , 433; Lange and Schou, <i>Histoire de l'Internationalisme</i> , 434; McNair, <i>The Development of International Justice</i> , 435; United Nations, <i>Repertoire of the Practice of the Security Council 1946-1951</i> , 436.	
Books Received	438
PERIODICAL LITERATURE OF INTERNATIONAL LAW	440
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

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THE UNITED NATIONS SECRETARIAT—SOME CONSTITUTIONAL AND ADMINISTRATIVE DEVELOPMENTS

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I. INTRODUCTION

The personnel difficulties of the United Nations Secretariat, so much dramatized since 1952, have served to focus exceptional attention on the Secretary General and his employment policies, as well as on the constitutional position of the Secretariat, its staff and their relations to the General Assembly and to the Administrative Tribunal. Indeed a substantial literature examining these issues¹—issues arising, in part, out of the United States' allegations of "subversive" personnel in the Secretariat—now must be added to the already imposing structure of scholarship dealing with international organizations and officials since their beginnings in the League system and into the United Nations period.² This paper, however, will be concerned principally with an examination of the legal and institutional significance of those aspects of the Secretariat personnel problem as expressed in the various reports by and to the Secretary General since 1952; in the amendments to the Staff Regulations and Rules and to the Statute of the Administrative Tribunal; in the debates and resolutions of the Fifth Committee and the General Assembly on these matters; and, finally, in the recent opinion of the International Court of Justice on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*.

¹ Cohen, "The United States and the United Nations Secretariat—A Preliminary Appraisal," 1 McGill Law Journal 169 (1953); Cohen, "The United Nations Secretariat and the Eighth General Assembly," Proceedings and Committee Reports of the American Branch of the International Law Association, 1954, p. 10; Green, "The Status of the International Civil Service," 6 Current Legal Problems 192 (1954); Friedmann, "The United Nations and National Loyalties," 8 International Law Journal 17 (1952-53); Anon., "Subversions in the United Nations," 5 Stanford L. Rev. 769 (1953); Anon., "Idéologies Nationales et Fonction Publique Internationale," 81 Journal du Droit International 276 (1954); Scott, "The World's Civil Service," International Conciliation, No. 496 (Jan. 1954), 296-314; Rolin, "Les Licenciements au Secrétariat de l'O.N.U.—Discours Prononcé au Sénat," Jan. 20, 1953; K. G., "International Officials—A Question of Loyalties," World Today (Nov. 1954) 488; Lie, In The Cause of Peace 386-405 (1954); Rolin, "Advisory Opinion on Rights and Obligations of International Civil Servants," M FICSA/4/53 (1953); Schwebel, "The International Character of the Secretariat of the United Nations," 30 British Year Book of International Law (hereinafter cited as Brit.Y.B.) 71 (1953).

² Kunz, "Privileges and Immunities of International Organizations," this JOURNAL (hereafter cited as A.J.I.L.), Vol. 41 (1947), p. 828, particularly p. 830, note 13; Cohen, *loc. cit.*, at 170-171, note 4. Both of these footnotes set out a substantial part of the Anglo-French bibliography in this field.

II. THE INTERNATIONAL SECRETARIAT—MAIN CHARACTERISTICS 1920–1946

The striking idea of an international organization whose permanent staff should be entirely divorced from control by member states or the states of employee nationality already was taken quite for granted within a decade after the establishment of the League system.³ While it is true that the Rhine and Danube Commissions of the middle nineteenth century, and the Postal Union as well as other bureaux and secretariats prior to World War I, indicated the possibility one day of a truly supra-national organization and staff,⁴ it remained for the League-International Labor Organization system to formulate the legal patterns and operate workable institutions in a world now deliberately aiming at security and welfare through collective international action.⁵

The League and the International Labor Organization (I.L.O.) raised novel and special legal problems. Indeed, these complex institutions soon began to reveal the emergence of a unique legal order, quite distinct from the normal patterns of customary and conventional international law relationships among states.⁶ There were at least three sets of new relations to be observed: the legal status of the League and the I.L.O. as juristic entities and their relations with Member States and non-member states; the relation of their employees to states, either Member States or non-member states, including states of the nationality of employees; and, finally, the relations of the staff to the organization itself. The first two sets of relationships presented legal problems that may have had some apparent if tenuous links to existing patterns of international law. That is to say, in both cases the legal position of a state in relation to international organizations or employees was involved and, therefore, traditional concepts of "sovereignty," "juristic person," "privileges and immunities" were applicable to any relevant theory or analysis. In the case of staff vis-à-vis organization, however, the issues were akin to those of municipal administrative law or civil service law and policy and bore no real relationship to traditional rules of international law strictly so called. But all three shared in common the fashioning of a constellation of legal concepts which together provided the framework for what is now understood as the constitutional law of international organizations.⁷

The evolution of methods to determine the relations of the League, the International Labor Organization and the Permanent Court of Interna-

³ 1 Walters, *A History of the League of Nations* 419–420 (1952); Ranshofen-Wertheimer, *The International Secretariat*, at 16 *et seq.* (1945); Scott, *op. cit. supra* note 1, at 260–262.

⁴ Kunz, *loc. cit. supra* note 2, at 828–831; Cohen, 1 *McGill Law Journal* 170–172 (1953).

⁵ Walters, *op. cit. supra* note 3; Kunz, *loc. cit.* at 832.

⁶ Green, *loc. cit. supra* note 1, at 193.

⁷ For a major contribution to focusing attention on these constitutional developments, see Jenks, "Some Constitutional Problems of International Organizations," 22 *Brit. Y.B.* 1 (1945); for a useful bibliography in this field, see Sohn, *Cases and Materials on World Law* 1–6 (1950).

tional Justice with Switzerland and The Netherlands, respectively, including the relations of their staffs to host and Member States, have been so fully discussed that no purpose would be served here by repetition.⁸ It will be sufficient to point out that the arrangements with Switzerland culminating in the *modus vivendi* of 1926⁹ acknowledged the juridical status of the League, its immunities and inviolability and provided for (i) full diplomatic immunity for its senior officials, (ii) less complete immunities for other officials, excepting Swiss nationals, and (iii) still more defined limits for Swiss nationals—the second having immunities from taxes and for all official acts, while the Swiss nationals were confined to certain limited cantonal tax and military service concessions. Throughout here the thread of thought was the provision of sufficient immunities and privileges to satisfy general functional needs as well as reasonable protocol and symbolic requirements. It is not surprising to look back and find both in Switzerland and The Netherlands a certain reluctance to provide exceptional status to international civil servants, particularly nationals of the host state.¹⁰ On the whole these arrangements were a workable compromise, and it was emphasized always that the immunities were for the benefit of the organizations and not for the personal use of staff.¹¹

Equally significant in this constitutional evolution was the erection of an order within which the new international civil service could function and grow with a sense of security, discipline and increasing competence. In retrospect, two lines of thought and practice are now discernible: the spiritual model for the League-I.L.O. Secretariat was British¹²—prizing above all else dedication, ability and integrity; but the institutional model was in part Continental,¹³ with particular reference to theories of employment. Here, the civil service employment was protected by law, with the employee having almost a vested “right” in his post.¹⁴ By contrast, the British model regarded the civil servant as subject to “employment at pleasure,”¹⁵ his contract therefore providing no more of a vested right than any contract of private employment terminable at the will of the parties. To meet the objective of the institutional model, suitable machinery was early established in the League and I.L.O. through their staff regulations¹⁶ and the Administrative Tribunal¹⁷ to define and limit authority of the

⁸ See citations referred to above in notes 2 and 3, *passim*.

⁹ Hill, *The Immunities and Privileges of International Officials* 138, 173–188 (1947).

¹⁰ *Id.* at 16–17.

¹¹ *Id.* at 24–25; Ranshofen-Wertheimer, *op. cit. supra* note 3, at 266–267.

¹² Lie, *op. cit. supra* note 1, at 43; Walters, *op. cit. supra* note 3, at 75–79.

¹³ Memorandum by the International Labor Office, in *Written Statements to the International Court of Justice in the Matter of Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Distr. 54/17, p. 26, at 31–36.

¹⁴ Schwartz, *French Administrative Law and the Common Law World* 87–88 (1954).

¹⁵ *Shenton v. Smith* [1895] A.C. 229; Mustoe, *The Law and Organization of the British Civil Service* 132–136 (1932); Dawson, *The Civil Service of Canada* 178–180 (1929).

¹⁶ Ranshofen-Wertheimer, *op. cit. supra* note 3, Ch. XVIII.

¹⁷ *League of Nations Official Journal*, 9th Yr., No. 5 (May 1928), at 751, Annex 1.

Secretary General to suspend or dismiss those holding contracts of employment, either permanent or temporary.¹⁸

Whatever other significance these institutional and constitutional procedures may have had, quite clearly they were intended to prevent Member States from interfering directly in the management of the new civil service and to vest in the League's Secretary General sufficient independence and protection to evolve employment policies that would assure the highest order of service. The oath of office¹⁹ and staff regulations for League officials reflected this Secretariat independence and the correlative "loyalty" expected of the international employee,²⁰ although the expression "loyalty" at that time had not become the contentious symbol the term may suggest today. Thus by 1946, when the League itself was being dissolved and the United Nations already had been established, the idea as well as the structure of an international organization with a civil service, independent of and immune from direct Member State control—except for the constitutional decision of a requisite majority of the members—was deeply rooted in international thinking and practice.²¹

III. THE UNITED NATIONS—ORGANIZATION AND STAFF

When the Preparatory Commission met in 1945²² to consider the institutional problems of the United Nations, it had before it a generation of experience with the League-I.L.O. system. That experience pointed to a number of institutional, constitutional and administrative requirements for a successful international organization now elaborately designed to embrace executive authority for security, collective methods for peace-keeping, common action for international welfare, as well as a variety of other delicate duties, particularly those touching trusteeship areas and non-self-governing peoples. Clearly such an institution would need a defined juristic identity as well as independence *vis-à-vis* host and Member States. It would need to be able to "protect" itself and its staff with the object of creating an authentic civil service and thus it would require some clear definitions of the relations of Member States to the Organization and staff. It would need to spell out the problem of the jural relations between, and the relative supremacy of, the various organs of the institution with respect to staff and internal administration. And generally it would have to provide for an internal government assuring strong management balanced by equity in the execution of employment policies and staff discipline and control.

¹⁸ See excerpt from Report of League Supervisory Commission, in Written Statement by the Secretary General of the United Nations, *op. cit. supra* note 13, at 199.

¹⁹ Ranshofen-Wertheimer, *op. cit. supra* note 3, at 245, for the form of the oath or "declaration of fidelity" instituted in 1932.

²⁰ *Ibid.* for an early U. S. concern that the declaration of fidelity may put the Organization above the employee's allegiance to his national government.

²¹ Lie, *op. cit. supra* note 1, at 39-54; Schwebel, The Secretary-General of the United Nations 30-48 (1952).

²² Report of the Preparatory Commission of the United Nations (1946), U.N. Doc. PC/20, Chs. VII, VIII.

These objectives were to be achieved by a series of constitutional and para-constitutional instruments that are now the foundation for the operation of the United Nations Organization and its staff: the language of the Charter dealing with the status and powers of the Secretariat and the Secretary General, as well as with the position of the General Assembly; the Headquarters Agreement with the United States; the General Convention on Privileges and Immunities; the Staff Regulations and Rules; and, finally, the Statute of the Administrative Tribunal.

1. *The Language of the Charter*

It is not without significance that the Charter should have been so specific in its provisions concerning the status of the Secretariat as one of the principal organs of the United Nations,²³ the rôle of the Secretary General as the chief administrative officer²⁴ and the juridical independence of the Organization,²⁵ the Secretary General and staff²⁶ for all purposes necessary to the effective execution of their objectives and responsibilities. The various articles are so much more elaborate than anything to be found in the Covenant of the League of Nations²⁷ as to make it abundantly clear that the signatories intended to create a "legal person" capable of the widest of independent international activities and employing a staff of efficiency, competence and integrity suitably protected against any Member or non-member pressures that might interfere with their functioning or their proper growth as an institution and a civil service.

Similarly, the Charter provided for a special rôle to be occupied by the General Assembly in the management of the internal government of the United Nations through vesting in it control over budget,²⁸ through authority to promulgate the staff regulations,²⁹ and through the power to create any subsidiary organs³⁰ that may be necessary for either the internal affairs of the United Nations or other purposes.

2. *The Headquarters Agreement of 1947*

Experience had indicated that it was desirable to elaborate in as much detail as possible the respective rights and duties of the Organization *vis-à-vis* the host state in whose territory the Headquarters were established. The Headquarters Agreement of 1947,³¹ therefore, reflects the League-I.L.O. background as well as the more comprehensive requirements envisaged by the Preparatory Commission and others for the total needs of the United Nations in the United States. Here again the principal themes were the juristic personality of the Organization,³² its independence

²³ Art. 7.

²⁵ Arts. 104, 105.

²⁷ Arts. 6, 7.

²⁹ Art. 101 (1).

²⁴ Arts. 97, 101.

²⁶ Art. 100.

²⁸ Art. 17.

³⁰ Art. 22.

³¹ 11-12 U.N. Treaty Series 11; 43 A.J.I.L. Supp. 8 (1949); *cf.* Brandon, "The Legal Status of the Premises of the United Nations," 28 Brit. Y.B. 90 (1951).

³² Art. III, Secs. 7, 8.

and its inviolability;³³ its right to archives³⁴ and various methods of communication;³⁵ its freedom from local government save for certain limited police and similar purposes;³⁶ its availability to visitors from Member or non-member states traveling on official business or at the invitation of the Organization;³⁷ and the diplomatic status attaching to delegations and their staffs.³⁸ Disputes were to be settled by arbitration.³⁹

3. *The Convention on Privileges and Immunities*

Here too the Preparatory Commission reflected in its recommendations the League-I.L.O. record, with particular respect to Switzerland.⁴⁰ The principal provisions were the conferring of diplomatic status only upon the Secretary General and the Assistant Secretaries General;⁴¹ the specific immunities attaching to all other officials and employees in the matter of official acts,⁴² taxation,⁴³ military service,⁴⁴ etc.; the use of these immunities only for the purposes of the Organization and the power of waiver in the Secretary General;⁴⁵ parallel immunities for experts employed *ad hoc*;⁴⁶ and the arbitration of disputes.⁴⁷ Only forty-three Member States have as yet acceded to the convention, while the United States has signed it but has not yet obtained Senate consent to ratification. Instead the status of the Organization and its staff in the United States rests upon the Headquarters Agreement on the one hand, and the International Organizations Immunities Act⁴⁸ on the other. This latter legislation does not provide for the comprehensive immunities set out in the convention and is particularly unhelpful with respect to United States nationals in the matter of exemptions from taxation and military service, matters now regulated by special bilateral arrangements.⁴⁹

³³ Art. III, Sec. 9.

³⁴ Arts. II and III.

³⁵ Art. II, Secs. 4, 5 and 6.

³⁶ Art. III, Secs. 7, 8, 9, and Art. VI, Sec. 16; Art. VII, Secs. 17, 18 and 19.

³⁷ Art. IV, Secs. 11, 12 and 13.

³⁸ Art. V, Sec. 15.

³⁹ Art. VIII, Sec. 21.

⁴⁰ Ranshofen-Wertheimer, *op. cit. supra* note 3, at 265-273; Hill, *op. cit. supra* note 9, at 24-29.

⁴¹ *Op. cit. supra* note 22; text of convention in 43 A.J.I.L. Supp. 1 (1949). The provisions of the Headquarters Agreement and the convention overlap, see 1 U.N. Treaty Series 15 (1946), Art. I, Juristic Personality; Art. II, Property Funds and Assets; Art. III, Facilities in Respect of Communication; Art. IV, The Representatives of Members (Privileges and Immunities). The provisions governing the Secretary General and staff are to be found in Arts. V, VI and VII. It is Art. V, Sec. 19, that confers diplomatic status on the Secretary General and Assistant Secretaries General.

⁴² Art. V, Sec. 18 (a).

⁴³ *Id.* Sec. 18 (b).

⁴⁴ *Id.* Sec. 18 (c).

⁴⁵ *Id.* Secs. 20, 21.

⁴⁶ Art. VI.

⁴⁷ Art. VIII, Secs. 29, 30.

⁴⁸ 59 Stat. 669 (1945); 22 U.S.C.A. §§ 288 ff.; 40 A.J.I.L. Supp. 85 (1946).

⁴⁹ See Handbook on Legal Status, Privileges and Immunities of the United Nations, U.N. Doc. St/LEG/2, at 277-334, for Federal and State laws, regulations etc. concerning the United Nations and other international organizations.

4. *The Staff Regulations and Rules*

With the establishment of the United Nations the General Assembly from time to time promulgated rules governing the conditions of employment for staff. These were brought together in their final form during the Sixth Session and the Regulations became effective on March 1, 1952,⁵⁰ with the Supplementary Rules effective on January 1, 1953.⁵¹ The Regulations and Rules deal with all aspects of employment, including the requisite standards of conduct for an international civil servant;⁵² disciplinary measures and powers of the Secretary General to enforce discipline;⁵³ the Joint Disciplinary Committee and the Joint Appeals Board as advisory machinery to which the Secretary General turns for advice in disciplinary and contract cases;⁵⁴ a Staff Council and a Joint Advisory Committee to provide for more effective staff relations and a joint development of personnel policies;⁵⁵ and, finally, powers of appointment, promotion, suspension and dismissal by the Secretary General.⁵⁶

This quite extensive machinery represented a compromise between the concept of strong managerial authority on the one hand, and, on the other, protection of staff interests in their posts as well as the encouragement of staff participation in the development of Secretariat personnel policies and the maintenance of high standards of discipline and morale. The Secretary General's powers to dismiss from service for any reason acceptable to himself extended to all cases of employees holding temporary contracts;⁵⁷ but in the case of fixed-term and permanent contracts he could dismiss without the consent of the staff member only for reasons of health, "unsatisfactory services," the abolition of a post,⁵⁸ or for "serious misconduct."⁵⁹ Al-

⁵⁰ U.N. Doc. ST/AFS/SGB/94; U.N. General Assembly Res. 590 (IV) (Feb. 2, 1952), effective March 1, 1952.

⁵¹ *Ibid.*; Preamble (Scope and Purpose): "... The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the U.N. Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General as the Chief Administrative Officer shall provide and enforce such Staff Rules consistent with these principles as he considers necessary."

⁵² Reg. 1.1 (international, not national responsibilities); Reg. 1.3 (no instructions from any authority external to the Organization); Reg. 1.4 (behave in manner befitting international civil servant); Reg. 1.5 (discretion in all matters of official information); Reg. 1.7 (no candidacy for public office); Rule 101.6 (no outside activities that may be prejudicial; no making of speeches, radio engagements, magazine articles etc.).

⁵³ Reg. 10.1; Reg. 10.2.

⁵⁴ Rule 110.1 (Joint Disciplinary Committee); Reg. 11.1 (Appeals); and Rule 111.1, 111.2, 111.3 (Joint Appeals Board, Composition and Procedures).

⁵⁵ Reg. 8.2 and Rule 108.2.

⁵⁶ Reg. 4.1 (appointment); Reg. 4.2 (appointment, transfer and promotion); Reg. 9.1 (a) (termination of permanent contract-holders on grounds of abolition of post, unsatisfactory services or health), (b) (termination of fixed-term appointment same as in (a) plus any other reason in letter of appointment), (c) (termination of temporary appointments, and permanent contract-holders still on probation in any case where it is in the interests of the United Nations); Reg. 10.2 (summary dismissal for "serious misconduct").

⁵⁷ Reg. 9.1 (c).

⁵⁸ Reg. 9.1 (a).

⁵⁹ Reg. 10.2.

of these powers have a most important bearing on the issues raised between 1952 and 1954.

5. *The Statute of the Administrative Tribunal*

The Tribunal was established by Resolution 351 (IV)⁶⁰ of the General Assembly. It was to act as a trial and "appellate" court to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat⁶¹ or of the terms of appointment of such staff members. These terms of appointment or contracts included all pertinent staff regulations and rules in force at the time of alleged non-observance.⁶² The Tribunal could only hear cases after they had been heard by the Joint Appeals Board, unless the Secretary General and the applicant agreed to go directly to the Tribunal.⁶³ In its original articles the Tribunal had power to order specific performance or, where the Secretary General in "exceptional circumstances" found such an order "impossible" or "inadvisable" to perform, the Tribunal could award compensation which was to be paid by the United Nations.⁶⁴ The significance of these powers as later amended will, of course, be examined below with particular reference to the judgment of the International Court in the *Awards Case*.

All of these measures provided a comprehensive framework within which it was expected that the Organization should be able to function effectively and mature both in spirit and technique with the demands made upon it.

IV. ADMINISTRATIVE AND POLITICAL DEVELOPMENTS, 1946-1953

With the establishment of the United Nations in New York and the excessively rapid recruitment program between 1946 and 1949,⁶⁵ it was inevitable that there should be a disproportionate number of employees who were nationals of the host country. From the beginning all Member States seemed to take the view that no pressure should be brought to bear on the Secretary General with respect to employment policies except in the matter of his most senior appointees⁶⁶ and on the question of reasonable geographic distribution of appointments. This policy was followed by the United States⁶⁷ except for its nomination of one or two American nationals, particularly the one designated for the office of Assistant Secretary

⁶⁰ U.N. Doc. A/CN.5/2, hereafter referred to as Statute.

⁶¹ Statute, Art. 2.

⁶² *Ibid.*

⁶³ Art. 7.

⁶⁴ Art. 9.

⁶⁵ Report of the Secretary-General on Personnel Policy (Jan. 30, 1953), U.N. Doc. A/2364, at 14: "... during the last nine months of 1946 some 2500 members were given appointments."

⁶⁶ Schwebel, *op. cit. supra* note 21, at 56-58.

⁶⁷ Secretary-General's Note to Correspondents, No. 582, Jan. 2, 1953, p. 2: "At that time . . . the United States Government did not wish to recommend United States citizens for employment or give official support or clearance to applicants and staff members."

General for Financial and Administrative Services.⁶⁸ Nor did the Secretary General at this time receive, or expect to obtain, from the United States or other Member States detailed information about the personal or political records of applicants, although in many cases, as a matter of ordinary personnel administration, such information was sought.⁶⁹ It is now clear that quite large numbers of senior and other rank personnel were hired with only a limited study made of their technical or personal records;⁷⁰ but considering the pressure upon the Secretary General to take on at once the elaborate load of responsibility imposed upon him by the Charter, a hurried employment program perhaps was inevitable.⁷¹

The climate of U. S. opinion in 1945-46, however favorable it was to the establishment of the United Nations in New York, did not go so far as to make it possible to obtain Senate approval of the Convention on Privileges and Immunities.⁷² Moreover, the onrush of the "cold war" after 1947 and the domestic concern for espionage and subversion generally, turned the attention of certain political leaders to allegedly subversive personnel in the Federal service first, and later in the international civil service, with particular reference to the United Nations. By 1949-50, the Secretary General was receiving occasional but very incomplete suggestions about United States nationals on the United Nations staff, whose political or personal records rendered them unsuitable, in the view of the United States, for employment with the United Nations.⁷³ At the same time the various Senate and House committees concerned with subversion and espionage, as well as a New York Federal Grand Jury, turned their attention to certain "suspect" United Nations staff members of American nationality. By 1952 a series of such persons had been subpoenaed before these committees and the Grand Jury,⁷⁴ and a number of them had refused to testify, claiming the protection of Amendment V of the U. S. Constitution providing for exemption from giving evidence in any criminal case, on grounds of possible self-incrimination.⁷⁵

⁶⁸ Schwebel, *op. cit. supra* note 21, at 56.

⁶⁹ See Statement by Assistant Secretary-General for Administrative and Financial Services, Dec. 23, 1952, in Annex I to Report, *op. cit. supra* note 65.

⁷⁰ *Ibid.*

⁷¹ See Statement by Secretary-General Lie on Personnel Policy to the Plenary Meeting of the General Assembly, resumed Seventh Session, March 10, 1953: "[speedy recruitment] . . . was necessary because the Organs of the United Nations took up their responsibilities almost immediately on a broad scale of activity and the Secretariat had to be created to serve them."

⁷² Cf. Report of Senate Committee on Finance on Immunities for International Organizations, Dec. 18, 1945, S. Rep. No. 861, 79th Cong., 1st Sess. (reprinted in S. Doc. No. 87, 83rd Cong., 2nd Sess., Review of United Nations Charter, A Collection of Documents 88-93).

⁷³ Report, Annex I, *op. cit. supra* note 69, at 2-3; Statement, *op. cit. supra* note 71: "the assistance . . . was not satisfactory although helpful in some respects."

⁷⁴ Report, *op. cit. supra* note 65, pars. 47, 59.

⁷⁵ *Ibid.*, par. 48 (re Grand Jury Proceedings); pars. 55-57 (re Internal Security Subcommittee of the United States Senate proceedings, where 17 members of the staff invoked the privilege against self-incrimination).

By 1952-53 the matter had reached critical proportions, partly because the situation had been exacerbated by the U. S. national elections in November, 1952, and partly because the position taken by the Secretary General in suspending certain United States nationals had aroused considerable feeling among some Member States. They believed that undue pressure was being brought to bear by the United States on the internal direction of the United Nations employment policies and that the Secretary General himself seemed unsure of a proper line to be followed and might be yielding too easily to such pressures. There was, in effect, a series of problems all woven together; allegations from political figures as well as the United States Government itself as to subversion or espionage by certain United Nations staff members;⁷⁶ the refusal of the United States Government to grant passports to a few United Nations staff members—thus preventing them from traveling on the business of the Organization; the refusal of a number of subpoenaed United States staff members to testify before the Grand Jury or Congressional committee; the occasional difficulties now arising in obtaining access to the United Nations Headquarters by persons traveling there on official United Nations business from other states;⁷⁷ the establishment of a new loyalty clearance procedure by President Truman and later by the Republican Administration governing all United States employees in the Secretariat as well as future applicants.⁷⁸

Meanwhile the Secretary General had received in November, 1952, the now celebrated opinion of the Commission of Jurists,⁷⁹ to which he had addressed certain questions about his powers to deal with employees having permanent contracts when they refused to testify on grounds of self-incrimination or where there had been allegations of subversion or a United States refusal to grant passports.⁸⁰ The Commission was also asked about the disclosure of information from United Nations archives to Congressional investigation agencies or grand juries, and, finally, whether the existing powers of the Secretary General were sufficient to permit him to dismiss permanent contract-holders where there was evidence of subversion—including past membership in a subversive organization—or a refusal to testify about such alleged activities.⁸¹

This Report, now one of the more noted documents of United Nations personnel history, was hurriedly drafted, but it did provide the Secretary General with justification for suspending or dismissing staff members refusing to testify;⁸² for denying to any agency of the host state access to United Nations official information;⁸³ and it also assured the Secretary

⁷⁶ Cohen, *loc. cit. supra* note 1, at 179.

⁷⁷ Report, *op. cit. supra* note 65, *passim*.

⁷⁸ Exec. Order No. 10422, 18 Fed. Reg. 239 (1953); Exec. Order No. 10459, amending Exec. Order No. 10422, 18 Fed. Reg. 3183 (1953).

⁷⁹ Opinion of Commission of Jurists (hereafter called Jurists' Opinion), U.N. Doc. A/FNF/51; also reprinted as Annex III to Report, *op. cit. supra* note 65, and in 47 A.J.I.L. Supp. 87 (1953).

⁸⁰ Cohen, *loc. cit. supra* note 1, at 181, for a summary of the questions put to, and findings made by, the Jurists.

⁸¹ *Ibid.*

⁸² Report, *op. cit. supra* note 65, at par. 64.

⁸³ Jurists' Opinion, *op. cit. supra* note 79, Pt. VII.

General that he had powers in the existing Staff Regulations to dismiss for "subversion" or failure to testify about such allegations.⁸⁴ Equally important, the Report said that in all cases of allegations from whatever source, the Secretary General must be satisfied by a "preponderance of evidence."⁸⁵ This latter standard conflicted with the new "security risk" standard that came into effect particularly in the revisions made by the Republican Administration early in 1953 to the Federal Service Loyalty Program as well as to the standards to be applied in the clearing of United States nationals for service with international organizations.⁸⁶ The Secretary General's Report of January, 1953,⁸⁷ reflected these various difficulties and problems and was largely influenced in its approach by the Jurists' Opinion. No major changes in the Staff Rules and Regulations were then contemplated, but meanwhile the Secretary General, Mr. Lie, appointed an Advisory Panel⁸⁸ to help with these "subversive" cases while at the same time a number of Mr. Lie's suspensions and dismissals were finding their way to the Administrative Tribunal directly or in due course after a hearing before the Joint Appeals Board. And before the Advisory Panel began to function, the Administrative Tribunal rendered a series of twenty-one important judgments,⁸⁹ ten of which resulted from cases where dismissals of permanent contract-holders had taken place in consequence of their use of the Fifth Amendment or for other reasons regarded by the Secretary General as rendering them unfit to serve with the Secretariat. These judgments will be referred to in greater detail below.

Meanwhile, a new Secretary General having been appointed,⁹⁰ he later presented to the Eighth General Assembly his own views for the management of the personnel problem both in the long-run as well as the more immediate issues arising out of the disputes over allegedly subversive American nationals in the Secretariat.⁹¹ Broadly speaking, the new Secretary General presented to the Eighth Session a series of interlocking programs:

- (a) Important changes in the Staff Regulations broadening the power of the Secretary General to suspend holders of permanent contracts and with new definitions concerning standards of service behavior.⁹² This was supplemented further by recommendations

⁸⁴ *Ibid.*, Pt. VI.

⁸⁵ This was the Secretary General's interpretation of the opinion; see Report, *op. cit. supra* note 65, pars. 92-98.

⁸⁶ Exec. Order No. 10459 (cited *supra* note 78), amending No. 10422, Pt. II, Sec. 1: "The standard to be used . . . shall be whether or not on all the evidence there is a reasonable doubt as to the loyalty of the persons involved to the Government of the United States."

⁸⁷ Report, *op. cit. supra* note 65, par. 64; Statement, *op. cit. supra* note 71.

⁸⁸ Report, cited *supra* note 65, at pars. 71-72.

⁸⁹ Judgments of the Administrative Tribunal of the United Nations, U.N. Docs. AT/DEC/18 to AT/DEC/38, Cases Nos. 26-46 inclusive.

⁹⁰ Mr. Dag Hammarskjöld was installed as Secretary General on April 10, 1953.

⁹¹ U.N. Doc. A/2533, Report of the Secretary General on Personnel Policy, Nov. 2, 1953.

⁹² *Ibid.* at pars. 58, 68, 73, 79; also Annex IV.

to reduce the discretion of the Administrative Tribunal to grant awards in unlimited amounts.⁹³

- (b) A program to reorganize the Secretariat and to introduce new types of contracts as well as new methods to supervise appointments and promotions.⁹⁴
- (c) A continuation of the studies that had commenced in 1952 under the chairmanship of Mr. F. P. Walters surveying the efficiency of staff.

The meaning of these various proposals will be evident when the main accomplishments of the Eighth and Ninth Sessions of the General Assembly are examined with particular reference to the Staff Regulations and the changes in the Statute of the Administrative Tribunal.

V. THE ADMINISTRATIVE TRIBUNAL AWARDS OF AUGUST, 1953

It is now necessary to examine briefly some aspects of these awards in order to fit them into the pattern that led eventually to the dispute in the Fifth Committee during the Eighth Session about the awards as well as to the recent decision of the International Court of Justice.

When the Tribunal was established in 1949 the general model the draftsmen of the Statute had in mind doubtless was the parallel tribunal established by the League of Nations as well as that serving the International Labor Organization and other specialized agencies.⁹⁵ The Tribunal was given the powers noted above, and undoubtedly it was intended from the language of Article II to be a "court" in the fullest sense of the term, not merely an appellate body from the Joint Appeals Board.⁹⁶ Indeed its powers to pass on the Staff Regulations and Rules were supplemented by procedures under its own rules whereby it heard evidence orally or in writing,⁹⁷ and thus examined witnesses, experts and the parties concerned, while counsel appeared in the usual manner on behalf of the "litigants."⁹⁸

Cases had come before the Tribunal from 1950 onward and indeed one judgment (Number 4)⁹⁹ had led to an amendment of the Staff Regulations in 1951 that now permitted the Secretary General to discharge holders of

⁹³ *Ibid.* at par. 81.

⁹⁴ *Ibid.* at pars. 88-108; *cf.* Memorandum of Secretary General to members of the staff *re* Organization of the Secretariat, U.N. Doc. ST/SGB/99.

⁹⁵ See Written Statement by the Secretary General of the United Nations, in Written Statements, *op. cit. supra* note 13, at 206-211; *cf.* Statute of the Administrative Tribunal of the International Labor Organization (adopted Oct. 9, 1946), 29 I.L.O. Official Bulletin 319-322.

⁹⁶ See Written Statements, *op. cit. supra* at 211-217, for a summary of the discussions in the Fifth Committee and elsewhere as to the views of Member States concerning the nature of the Tribunal and its functions.

⁹⁷ See Rules Adopted by the Administrative Tribunal June 7, 1950 (as amended Dec. 20, 1951, U.N. Doc. A/T/7), Ch. III, Arts. 7-12 (Written Proceedings); Ch. IV, Arts. 13-15 (Oral Proceedings).

⁹⁸ Art. 12.

⁹⁹ Hourani and 4 others, Cases Nos. 17 to 21, AT/DEC/4, particularly p. 10; *cf.* Staff Reg. 9.1 (c).

temporary contracts without giving reasons when "in his opinion such action would be in the interest of the United Nations."

The fact that the Staff Regulations and Rules, by Article II of the Statute, were made part of the contract of employment necessarily imposed upon the Tribunal the duty of interpreting the language of the Regulations and Rules as well as the language of the Statute itself. Thus from the very beginning the Tribunal became an important constitutional agency in the management of the relations of the Organization to staff. To that extent, therefore, the Statute and Tribunal represented a limitation on the powers of the Secretary General because the last word in the interpretation of the Staff Regulations and Rules and the Secretary General's actions under them, rested with it as a "court." At the same time the General Assembly, having created the Tribunal under Article 22 of the Charter and thus having powers to amend the Statute and to change the Staff Regulations from time to time, necessarily exercised a potential *post hoc* control over the Tribunal and its future position.

The rôle that the Tribunal was to play as an independent interpreter of the powers of the Secretary General and his procedures in dealing with dismissals from employment became strikingly evident in the twenty-one cases resulting from suspensions and dismissals by the Secretary General. Of these, eleven were holders of temporary contracts and ten were permanent employees. All had refused to testify before either the Federal Grand Jury or congressional committees or otherwise allegedly had infringed upon that standard of civil service behavior as determined largely by the Jurists' Opinion and adopted by the Secretary General.

No purpose would be served in examining these judgments in detail. It will be sufficient to indicate that of these twenty-one cases, ten of the applications (temporary contract-holders) were rejected, one on procedural grounds and the others on matters of substance.¹⁰⁰ Here, in essence, the power of the Secretary General to dismiss under Regulation 9.1 (c) "in the interest of the United Nations" was sustained. As to the eleven others, one case represented a temporary indefinite contract (Crawford, No. 18), while ten were permanent contract-holders. Of these, seven were awarded compensation because of the improper dismissals, while reinstatement was ordered with respect to four others. Later, the Secretary General exercising his option because of "exceptional circumstances" and finding it "impossible or inadvisable" to reinstate,¹⁰¹ the Tribunal thereupon assessed compensation in favor of these four in lieu of reinstatement. The amount of the eleven awards totaled \$179,420.00.

What is interesting about these eleven judgments is the conception the Tribunal had of its own functions and the effect of that conception on the powers of the Secretary General. Perhaps the result of these judgments can best be viewed through the Joel Gordon Case,¹⁰² where again the alleged ground for dismissal by the Secretary General was "serious mis-

¹⁰⁰ Judgments, *loc. cit. supra* note 89.

¹⁰¹ See Written Statement, *loc. cit. supra* note 95, at 172.

¹⁰² Case No. 37, Judgment No. 29, U.N. Doc. AT/DEC/29.

conduct," permitting a summary discharge under Article 10.2 of the Regulations, because Gordon had claimed the privilege of the Fifth Amendment in a congressional hearing. The Tribunal said:

9. In the present case, the Applicant invoked the privilege provided in the constitution of his country. This step did not give rise to legal procedures against the Applicant. This provision of the constitution may be properly invoked in various situations which, because of the complexity of the case law, cannot be summarized in a simple formula.

The legal situation arising from recourse to the Fifth Amendment was so obscure to the Secretary-General himself that he considered it desirable to seek clarification from a Commission of Jurists. These cases were later discussed by the General Assembly who reached no decision. Subsequently these conclusions were partially set aside by the Secretary-General himself.

The nature of serious misconduct appeared so disputable to the Secretary-General that he granted termination indemnities which are expressly forbidden by the Staff Regulations (Annex III) in cases of summary dismissal.

Whatever view may be held as to the conduct of the Applicant that conduct could not be described as serious misconduct which alone under Article 10.2 of the Staff Regulations and of the pertinent Rules justifies the Secretary-General in dismissing a staff member summarily without the safeguard afforded by the disciplinary measure.

10. In these circumstances, the decision to terminate the Applicant's employment since it cannot be based upon the provisions of the Staff Regulations and Rules must be declared illegal.¹⁰³

While evidently the Secretary General had weakened his position in attempting to use the charge of "serious misconduct," when he was quite uncertain as to its meaning—at least enough to have proposed termination indemnities which were not permitted in such cases by the Regulations—nevertheless the Tribunal is quite definite that a claim to the protection of the Fifth Amendment was not incompatible with the terms of employment in the international civil service, within the then Staff Regulations and Rules. Viewed on the level of analysis familiar to students of municipal administrative law, this was an interesting example of a superior court not accepting the findings of fact of an administrative authority having discretion, *e.g.*, to determine the fact of "serious misconduct."¹⁰⁴ Rather the Tribunal employed its judicial power to interpret the legislative language in the Statute and Regulations as a means of determining the legal consequences of these facts. This is an old story not only in the field of administrative law but in the relations of appellate courts to facts found in the trial courts below. What is clear, therefore, is the following:

(1) The Administrative Tribunal undertook, as it needs must, to have the last word on the meaning of the Staff Rules and Regulations, with particular reference to contracts and terms of appointment.

¹⁰³ *Ibid.* at 8-9.

¹⁰⁴ Davis, *Administrative Law* 868-870, and 902-905 (1951); Dickinson, *Administrative Justice and the Supremacy of Law* 168 (1927).

(2) The Tribunal did not regard itself as an appellate or reviewing body examining facts already found by an inferior administrative authority and bound by those findings of facts. Rather it was a trial court *de novo* examining the information provided by the parties and able to invite, on its own motion, other information if in its opinion the written or oral statements submitted by the parties were incomplete.

(3) In every aspect of its functioning the Tribunal has behaved as a court and its decisions read with the sound of traditional case law ringing through them.

VI. THE EIGHTH GENERAL ASSEMBLY AND CHANGES IN THE STAFF REGULATIONS AND STATUTE OF THE TRIBUNAL

The foregoing judgments of the Administrative Tribunal were handed down in August, 1953, some months after the appointment of the new Secretary General but before he issued his own important Personnel Report to the Eighth Session in November, 1953.¹⁰⁵ The effect of these awards by the Tribunal had been to arouse further that sector of United States opinion already sensitive to the dramatic allegations about subversives among United States nationals on the Secretariat staff.¹⁰⁶ At the same time many delegations in the final meetings of the Seventh Session in the Spring of 1953 had expressed their great concern for what appeared to be an attack upon the legal and administrative independence of the Secretariat and staff and, therefore, on the United Nations itself. Thus, when the Eighth Session was convened and had upon its agenda the personnel dispute, there were two main aspects to the problem: the first dealing with suspension and dismissal of certain staff members and the effect on the relations of the United Nations to the United States because of these events; the second, arising out of the Tribunal's awards and rendered particularly acute because of a reluctance on the part of the United States to accept the validity of the awards.¹⁰⁷ There was therefore the prospect of a challenge to the awards when the time came to vote the necessary appropriations for them.

With respect to the first issue it is worth repeating that a very large part of the United Nations debates and public discussion in 1952 and 1953 tended to emphasize the possible threat to the independence of the Secretariat because of the pressures arising out of United States opinion on "subversive" personnel.¹⁰⁸ However, when the Secretary General made his proposals to the Eighth Session, they were primarily directed not toward obtaining some new General Assembly assurances as to the independence of the Organization or the Secretariat. Rather the Secretary General sought in his Report a reformation of his powers to employ and dismiss staff as well as some limitations on the powers of the Administrative Tribunal to deal with awards of compensation. The significant thing, there-

¹⁰⁵ *Op. cit. supra* note 91.

¹⁰⁶ New York Times, Sept. 27, 1953, Sec. 1, pp. 1, 37, and Sec. 4, pp. 1-2; also Oct. 2, 1953, p. 6.

¹⁰⁷ Annual Report of the Secretary General 1953-1954, U.N. Doc. A/2663, p. 118.

¹⁰⁸ For a summary, see Cohen, *loc. cit. supra* note 1, at 189-191.

fore, about the Secretary General's proposals *was the shifting of the line of his interest from the expected issue of the immunities and privileges of the Organization to the less dramatic but more practical objective of effective managerial authority in the Secretary General* adequate to meet all necessary requirements for maintaining the highest level of staff competence, impartiality and integrity.

In his proposals the Secretary General recommended changes in Regulation 1.4 dealing with the general principles of staff conduct,¹⁰⁹ and Regulation 1.7 governing political activities,¹¹⁰ and proposed adding to Regulation 9.1 (a) new provisions giving him additional authority to terminate employment of holders of permanent appointments.¹¹¹ At the same time Article 9 of the Statute of the Tribunal was to be amended to set limits on the powers of the Tribunal in the awarding of compensation to dismissed personnel and to increase the Secretary General's area of option to refuse reinstatement, with compensation to be paid instead.

After considerable study by the Advisory Committee on Administrative and Budgetary Questions as well as by the Fifth Committee, the Secretary General largely achieved his objectives. Regulation 1.4 dealing with general principles of conduct by international civil servants was strengthened by adding to its provisions covering public announcements which may adversely reflect on civil servant status the following: ". . . or on the integrity, independence or impartiality which are required by that status."¹¹² Regulation 1.7 concerning political activities had provided only that any staff member who becomes a candidate for a public office of a political character shall resign. It was now to read:

Staff members may exercise their right to vote but shall not engage in any political activity which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants.

This regulation was later implemented by Rule 101.8¹¹³ permitting membership in a political party, provided that it did not entail action or obligation to action contrary to Regulation 1.7. Obviously some difficulties may arise here if staff members wish to participate in local government activities.

Most important, however, was the amendment to Regulation 9.1 (a) providing for new grounds empowering the Secretary General to dismiss the holders of permanent appointments. It will be remembered that the Secretary General only had power to dismiss permanent appointees on grounds of health, abolition of post, "unsatisfactory services" or of summary dismissal for serious misconduct. Now, however, he was to have power to dismiss where there was an absence of ". . . the higher standards

¹⁰⁹ Report, *op. cit. supra* note 91, pars. 68-72.

¹¹⁰ *Ibid.* pars. 73-77.

¹¹¹ *Ibid.* pars. 58-67, 79-80.

¹¹² U.N. Doc. ST/AFS/SER/A/231, and supplementary Rules in ST/SGB/94, Amend.; cf. 21st Report of Advisory Committee on Administrative and Budgetary Questions to the Eighth Session of the General Assembly, U.N. Doc. A/2555.

¹¹³ ST/SGB/94, Amend. 1, p. 3; General Assembly Res. 782 (VIII).

of integrity required by Article 101, Para. 3. of the Charter,"¹¹⁴ on grounds also of "facts anterior to the appointment of the staff member and relevant to his suitability" which come to light and which, if they had been known at the time of the appointment, "should . . . have precluded his appointment."¹¹⁵ But these two reasons were to be used by the Secretary General only when a case under them had been considered and reported on by a special advisory board to be appointed for such purposes. Finally, the Secretary General was to have power to dismiss permanent contract-holders ". . . if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned."¹¹⁶ In this latter case the Secretary General had the option of awarding a termination indemnity not more than fifty per cent higher than that which would be otherwise payable.

Faced with a body of interpretation by the Administrative Tribunal which very much restricted his power to dismiss in such cases where staff members took advantage of the Fifth Amendment, it was not unnatural for the Secretary General to seek a larger number of pegs upon which to hang lawful decisions to terminate employment. In his Report to the Eighth Session the Secretary General had been frank about his need for these powers. He recognized the danger of possible abuses, but as a check he was quite prepared to accept the continuing rôle of the Administrative Tribunal as the ultimate interpreter of his authority. For, as he stated, ". . . the decisions of the Secretary-General would remain subject to review by the Administrative Tribunal to the full extent of its present authority."¹¹⁷ However, ". . . to this would be added the possibility of a review by the General Assembly of the principles developed in the implementation of the standards specified in the Staff Regulations."¹¹⁸ But while the Secretary General recognized the rôle of the Tribunal in reviewing the language of the Regulations and thus the powers and decisions of the Secretary General, the Report suggests that perhaps the Tribunal's principal emphasis would be on matters of procedure as well as the "bias, discrimination or arbitrariness" of the Secretary General.¹¹⁹ At the same time, he expected the Tribunal to accept his interpretations as to what constituted "lack of integrity" or "political activity" to the extent that they obviously involved "considerations of administrative policy which are not open to review of a strictly legal nature."¹²⁰ Again, a not unfamiliar administrative law conception of judicial review and its desired limitations.

¹¹⁴ Staff Reg. 9.1 (a) (i).

¹¹⁵ Staff Reg. 9.1 (a) (ii).

¹¹⁶ This is an unnumbered final paragraph in Reg. 9.1 (a). These provisions are all additional to the existing powers in 9.1 (a) to dismiss permanent contract-holders for abolition of post, unsatisfactory services and incapacity by reason of health; there is also the summary dismissal provided for in Reg. 10.2 for "serious misconduct."

¹¹⁷ Report, *op. cit. supra* note 91, par. 54; also see par. 35 for similar sentiments.

¹¹⁸ *Ibid.*; see also par. 66.

¹¹⁹ *Ibid.* par. 35; see also pars. 37-38: "In the constitutional traditions of a great number of countries the control upon the chief executive . . . is what may be called a parliamentary one."

¹²⁰ *Ibid.*

The significance of these amendments may be summarized as follows:

1. A stricter view of international civil service behavior in political matters has been established.
2. The Secretary General has a number of new grounds upon which to base his dismissal of permanent contract-holders, but, since these cases are subject to screening by an advisory board on the one hand, and to review by the Tribunal on the other, it remains a nice question how far the new language will in fact increase his actual authority.
3. The "anterior facts" and "integrity" standards are both open to abuse. But the buffers of the Board and the Tribunal may be sufficiently effective to safeguard most staff interests.
4. It will be interesting to see whether this actual increase in authority does not raise as many problems of interpretation as the more general language of Articles 1.4 and 9.1 (a) had previously done. This is very suggestive of the traditional debate between those who prefer detailed codification as against more general standards. Indeed a further Assembly resolution required the Secretary General to report to the Tenth Session in 1955 on developments with respect to staff rules and their application.¹²¹

The same session also amended Article 9 of the Tribunal Statute which, apart from certain minor procedural changes, now limits awards to two years' net base salary save for exceptional cases when a higher indemnity may be ordered.¹²² At the same time the Secretary General is not limited as he formerly was to refusing reinstatement or specific performance only in "exceptional circumstances," but now he may take the option of paying compensation within thirty days of the judgment. The effect of these amendments is to broaden the discretion of the Secretary General *to dismiss anyone for any reason if he is willing to face the prospect of an indemnity that will amount to at least two years' net base pay or a greater amount in exceptional cases.*

VII. THE AWARDS JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE

In the Fifth Committee at the Eighth Session, the United States, supported only by a very few delegations, rejected the validity of the Tribunal's awards in the eleven cases. As a result, the Fifth Committee as a compromise recommended, and the Assembly resolved, to request an advisory opinion from the International Court of Justice.¹²³ The following questions were put to the Court:

- (1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Na-

¹²¹ General Assembly Res. 782 (VIII) C. ¹²² *Ibid.* Pt. B.

¹²³ [1954] I.C.J. Rep. 47; 48 A.J.I.L. 655-660 (1954).

tions whose contract of service has been terminated without his assent?

- (2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?

The Court held that the General Assembly did not have the "right" on "any grounds" to refuse to give effect to an award of compensation by the Tribunal where the subject-matter of the Tribunal's decision was within its proper competence under its Statute. This case already has been commented upon in an issue of this JOURNAL,¹²⁴ but it will be desirable to restate some of the main principles of United Nations constitutional law that have emerged from the decision.

After examining the powers of the General Assembly, the position of the Secretariat and the Secretary General, the Staff Regulations and the Statute of the Tribunal, the Court held ¹²⁵ as follows:

1. The Tribunal was intended to be a judicial body rendering final judgments whose effect would be binding between the parties and *res judicata*, without appeal.

2. The Tribunal has jurisdiction to interpret the Staff Regulations and Rules as part of its jurisdiction over disputes between a staff member and the Organization in matters affecting his contract and terms of appointment.

3. The decisions of the Tribunal are binding on the parties and this means that they are binding not only on the Secretary General but on the United Nations as a whole and, therefore, on all the organs of the United Nations, directly or indirectly affected by the decisions.

4. The General Assembly has the power to establish such a Tribunal, to give it a judicial character and to make its judgments binding upon the Organization. This was a lawful exercise of the Assembly's authority to create additional organs of the United Nations and to provide a framework of rules within which the staff of the Secretariat should function in relation to the Organization. Such a capacity to establish this kind of tribunal arises by necessary implication or necessary intendment out of the Charter.

5. The fact that the Assembly may amend the Statute of the Tribunal or the Staff Regulations or may abolish the Tribunal does not affect the status of the Tribunal while it lawfully exists nor does it affect its judgments when rendered. The General Assembly itself was never intended by the Charter to function as a judicial body in executing its supervisory powers in the matter of the relations of staff to Organization.

6. The function of the General Assembly in approving the budget of the United Nations, and therefore in voting the amounts required to pay the awards made by the Tribunal, does not mean that the Assembly has power to refuse to honor the obligations of the Organization and such awards must be treated as an *obligation* of the Organization, *res judicata* and without appeal.

¹²⁴ 49 *id.* at 6-9 (1955).

¹²⁵ [1954] I.C.J. Rep. 51-61.

7. Finally, the argument that the Tribunal is a subordinate, subsidiary or secondary organ does not in any way affect its capacity to render decisions binding on the Organization if a duly enacted statute of the Assembly vests such power in it. And it is not an unlawful infringement or intervention of the powers of the Secretary General or the Assembly to have had such a Tribunal created, on the one hand capable of interpreting the regulations controlling the Secretary General's powers in staff matters, and, on the other, binding upon the Organization as a whole, including the General Assembly, so as to compel the Assembly to honor obligations by voting them in the budget.

These are interesting and weighty pronouncements as to the relations of the General Assembly to such a "subsidiary" organ; and perhaps what is most significant are the limits to the Assembly's power over the budget to affect "obligations" created for the Organization as a whole by other authorized organs.

The decision should be read in the light of the arguments put before the Court in a series of interesting and in some cases elaborate written statements by eleven member governments as well as the statements by the Secretary General of the United Nations and the International Labor Office.¹²⁶ Undoubtedly, the most comprehensive statements by Members were those of the governments of the United States, France, the United Kingdom and The Netherlands, while the memoranda from the International Labor Office and the Secretary General were extremely detailed analyses of historical materials affecting the Tribunal and its establishment, as well as the experience with the League of Nations Administrative Tribunal.

Broadly speaking, the United States' position insisted on the general supremacy of the General Assembly because of its power over the budget; because it could and should review the decisions of a tribunal it had created; and, finally, because the history of the drafting of this Statute as well as the League of Nations Administrative Tribunal suggested an intention to maintain the supervisory position of the General Assembly.¹²⁷ Indeed the United States listed in its conclusions a series of situations where General Assembly refusal might be justified,¹²⁸ such as where the Tribunal relied upon false representation by a party; manifest misinterpretation of the Regulations or a flagrant disregard of the Statute or Rules; *ultra vires* awards; serious misconstruction of the Charter; arbitrary or unreasonable awards; awards entailing impossible financial consequences for the Organization.

On the other hand, the United Kingdom, in examining the practice of the League of Nations Administrative Tribunal, pointed out that, despite the decision of the 1946 Assembly which overruled the last judgments of that Tribunal, there had been a long tradition most suggestive that awards by the Tribunal were an obligation placed upon the Assembly to make

¹²⁶ Written Statements to the International Court of Justice in the matter of Awards of Compensation made by the United Nations Administrative Tribunal, Distr. 54/17.

¹²⁷ *Ibid.* at 115-135.

¹²⁸ *Ibid.* at 166-167.

budgetary provision therefor and that such awards could not be contested by the Assembly.¹²⁹

The French Government statement came to the conclusion that there was no legal basis for the Assembly refusing to pay the awards except perhaps in the unlikely circumstance of financial disability facing the Organization.¹³⁰ This would be a reason of necessity, not a reason of law, and the French Government admitted that it merely raised the question theoretically and that it had no practical meaning for the present case.

Undoubtedly the arguments before the Court that were most difficult and had to be met were those put forward by the United States in its insistence on the supreme position of the Assembly, both in creating the Tribunal and in being able to destroy it, as well as the Assembly's position as the final arbiter in the expenditure of funds on behalf of the Organization because of the Assembly's power to approve the budget.

It is interesting that the Court was able to overcome both arguments with a good deal of logic and force. As to the supreme position of the Assembly the Court made it clear that, once the Assembly created an organ, it could not deny the effects which the Statute provided in setting up a United Nations constitutional instrument capable of rendering final and binding judgments. Particularly was this the case when the functions of the organ were to be judicial, functions which the Charter did not vest in the Assembly itself. Again, all of the obligations of the Organization had to be honored by the Organization, and while there may have been a strictly political "power" to refuse to vote the budget or an item therein—although the Court does not spell this out—there was no "legal" right to employ the Assembly's functions in relation to the budget to prevent the payment of a due obligation of the Organization as a whole. In essence, the Court was saying that once a judicial body had been created, its functioning and its awards should be treated as binding in the same way as the decisions of courts under national laws may bind all the organs of the state.¹³¹

VIII. THE NINTH SESSION AND THE SECRETARIAT

The recent session of the Assembly witnessed the climax of these past three years of developments in personnel policies and in the difficulties discussed above. The Secretary General presented to the Fifth Committee an interim personnel report outlining the developments since the Eighth General Assembly and the important changes in the Staff Regulations and Rules.¹³² He presented also his Report on the Organization of the Secretariat describing in detail the reorganization of the various departments of the Secretariat and the appointment of a series of Under Secretaries

¹²⁹ *Ibid.* at 109-110.

¹³⁰ *Ibid.* at 22.

¹³¹ *Supra* note 123, at 61: "... it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."

¹³² Report of the Secretary General on Personnel Policy of the United Nations, U.N. Doc. A/2777; also Report of the Fifth Committee, U.N. Doc. A/2832.

with and without departmental responsibilities.¹³³ Finally, the Fifth Committee, largely under the leadership of the United States, examined the question of the International Court's opinion in the *Awards Case* with particular preference to the future status of the Tribunal.¹³⁴

It is not possible to deal in detail with all of these matters. Suffice it to say that the Personnel Report disclosed the fact that the machinery contemplated in administering the extremely delicate grounds for dismissal under Regulation 9.1 (a) had been put into force with the establishment of a special Advisory Board, and that during its first session in mid-1954 only two cases were considered and reported on by it.¹³⁵ The Secretary General promised that he would provide the Tenth Session with a review of the principles and standards developed in the work of the Board as required by the Eighth Session in Resolution 782.¹³⁶ Perhaps most interesting of all was the recent appearance of the Report on Standards of Conduct in International Civil Service, prepared by the International Civil Service Advisory Board.¹³⁷ The Secretary General properly stressed the importance of this report and, indeed, in many respects it is a classical statement as to standards of behavior for international civil servants. It is significant that the inflammable question of "loyalty" of the international public servant is approached by the Board's Report in the following forthright language:

... an international outlook . . . flows from understanding of and loyalty to the objective and purposes of the international organization as set forth in its Charter or Constitution. The acceptance of the oath of office and of the basic obligation to serve wholeheartedly and completely the organization's interests needs to be worked out in many directions. It involves willingness to try to understand and be tolerant of different points of view, different cultural patterns, and different work habits. It also entails willingness to work without prejudice or bias with persons of all nationalities, religions and cultures. It means a readiness to be continually conscious of how proposals, events and statements of opinion may appear to a very wide range of nationalities . . . In fact, the highest type of loyal international civil servant is one who finds that whatever his personal views he can willingly conform to the observance of his international obligations and support the decisions of the international organization he serves. . . . What is essential is not the absence of personal political or national views but rather restraint at all times . . . in the expression of such views.¹³⁸

In the Fifth Committee the United States, supported at first by Argentina and later by Canada, Chile and Turkey,¹³⁹ presented a draft resolu-

¹³³ Organization of the Secretariat, Report of the Secretary General, U.N. Doc. A/2731.

¹³⁴ Report of the Fifth Committee re Awards of Compensation Made by the United Nations Tribunal, Advisory Opinion of the International Court of Justice, U.N. Doc. A/2883.

¹³⁵ Report of the Secretary General, *supra* note 132, at 7.

¹³⁶ Secretary General's Report, note 113.

¹³⁷ *Op. cit.* note 113, at 4.

¹³⁸ Draft resolution of Argentina and U. S. A., U.N. Doc. A/C.5/L.317 as amended by U.N. Doc. A/C.5/L.321, and U.N. Doc. A/C.5/L.321, Rev. 1; also Belgian draft A/C.5/L.322.

¹³⁹ U.N. Doc. COORD/CIVIL SERVICE.

tion which sought to solve the awards question once and for all by a compromise, which the United States accepted, namely, an authorization to pay the present awards from a newly-established revolving fund, but a decision on principle to accept the theory of a permanent or *ad hoc* judicial body to provide for appeal from or "review of" the Administrative Tribunal's decisions. In the Fifth Committee there seemed to be much confusion of thought and considerable dispute as to the value of these proposals. In the end an inconclusive vote in the Committee led to a resolution rejecting the principle of appeal and establishing only a special committee to study the problem, in addition to now authorizing payments.¹⁴⁰ But when the matter went to the Plenary Session of the Assembly, the principle "of review"—not appeal—was reasserted with success and a special committee was established to examine the problem in 1955, and to report back to the Assembly at the Tenth Session.¹⁴¹

In the debates in the Plenary Session it must be confessed that Senator Fulbright's arguments as to the desirability for a review on principle were not very convincing. He insisted that judicial review procedure would strengthen the relations between the Secretary General and the staff, declaring that

on his side the Secretary-General will have an assurance that the decisions he makes as the chief administrative officer of the Organization will receive the fullest judicial consideration and that his authority laid down in the Charter and the Staff Regulations will be given full legal respect. On their side the staff will have greater assurance that their legal rights and privileges will be observed.¹⁴²

Perhaps one of the strongest arguments against the United States' position was made by Mr. Sapru of India.¹⁴³ He pointed out that Senator Fulbright in the Fifth Committee and elsewhere may have misread the Court's judgment when he believed the Court recommended the establishment of a judicial review procedure, and in this criticism he seems quite justified.

It now remains for the seventeen named member countries¹⁴⁴ to meet at a time to be fixed in consultation with the Secretary General and to report back to the Fifth Committee at the Tenth Session.

IX. CONCLUSIONS

Since it is now possible to view this long and complex development in some perspective, the following observations seem relevant:

1. The international civil service represented particularly by the United Nations Secretariat has undergone quite severe psychological and administrative distress as a result of allegations concerning its integrity, of claims of espionage and the over-dramatized significance of cases of personnel who refused to testify before United States Senate committees or Federal Grand Juries; of the lack of a clearly defined policy by the Or-

¹⁴⁰ Cited *supra* note 132, at 16-18.

¹⁴¹ U.N. Doc. A/L. 192.

¹⁴² Provisional Record, U. N. Doc. A/P.V. 515, at p. 18.

¹⁴³ *Ibid.* at 21-22.

¹⁴⁴ *Ibid.* at 20.

ganization in dealing with the pressures brought to bear upon it by the host country; and finally, of the reorganization and weeding-out processes that have been taking place during the past two or three years, first under the Walters Committee and recently in the reorganization sponsored by the present Secretary General. Nevertheless, out of all of this strain has come some good. It at least has led Member States to define for themselves the constitutional position of the Organization, the Secretariat, and the General Assembly in dealing with staff matters as well as host and Member State relations. And that clarification should lead to greater stability internally as well as in relations of the Organization to all states.

2. Greater clarification has come also to the question of the so-called competing loyalties affecting the international staff member. Men are capable of varieties of loyalties and it is a misuse of the term to confine its application to national political allegiance alone. There is no necessary conflict in loyalties between the civil servant's international responsibilities and his proper national obligations. There may well be a conflict of interests, but that takes place in any situation where differing functions or objectives are involved. Moreover, the composition of the United Nations is such that there may be a rejection by staff members of the state of their original nationality, such as for example employees who are refugees from certain states that are Members of the international organization. Not very many Member States of the free world would insist upon public evidences of loyalty by such refugees to the states from which they have escaped. The demand for loyalty, therefore, cuts more than one way. At the very best it can mean no more than the integrity and good sense set out in the credo quoted above. A host state in particular, and perhaps Member States in general, have a right to expect that their nationals shall not deliberately engage in conspiratorial political action against them. Beyond this the line becomes hard to draw unless there are personal defects, and then the question is no longer one of "loyalty" but one on another level of civil service acceptability.

3. The strengthening of the Secretary General's position *vis-à-vis* staff through the amendments to the Regulations at the Eighth Session suggest that the United Nations may be moving away from the Continental "vested right" model toward the Anglo-American civil service theory with its greater emphasis on managerial discretion. Nevertheless, the present forms within which the Secretariat staff member operates and keeps his position remain much more closely related to the European system than to the continued Anglo-American reliance upon technical legal insecurity offset by traditional non-legal safeguards to protect public service employment.

4. The *Zawadz Case* provided an opportunity to spell out in greater detail than heretofore the relations of the General Assembly to the Secretariat and to the Administrative Tribunal. It is now clear that the Assembly is not a supreme legislature even with respect to matters confined to it by the Charter; but rather that it is one principal organ of an institution operating within a constitutional framework and it is limited by that framework

as these limits are spelled out from time to time by judgments of the International Court or by constitutional conventions slowly developing in the various organs of the Organization itself. The rôle of the Tribunal essentially will be to maintain a balance between the staff and the Secretary General, and its "intrusions" are likely to be in direct ratio to the sense of equity and security engendered in the staff by the Secretary General's employment policies and interpretations of his authority.

5. Finally, it is now evident, if more proof were needed, that international organizations and their staffs need a certain minimum working immunity from local jurisdiction; but that no elaborate claims have been made or need be made for privileges that shelter the staff or the organization from general local law or community relations. It is significant that the debate on the personnel problem has not given rise to any new demands for restating the independence of the Organization or the Secretariat except for the hope expressed by the Secretary General that the Convention on Privileges and Immunities should be adopted by all Members not only for purposes of legal convenience, but for its subtle symbolic value.

6. There remains unresolved as yet the question of access to the United Nations Headquarters site by persons coming from abroad to New York on the business of the Organization and who are not members of delegations. There is some indication that progress is being made to improve the situation. Other host states—Switzerland, France, Italy and Canada—have not raised similar difficulties for their guest international organizations. Again the stabilization of Staff Rules and standards will need to be carried further so as to bring some degree of common practice into the procedures followed by the whole family of the United Nations. Recent developments with respect to changes in the staff rules of UNESCO¹³⁵ and dismissals of personnel there suggest that the problem is by no means at an end, although it is not anything like as serious today in numbers or intensity as once it was.

Considering the tensions created by the "cold war" and depth of the political passions and strategic fears, it is remarkable to think that an international, indeed almost universal organization embracing both "East" and "West," should not only have survived but should be carrying on its political and welfare activities with considerable vigor. The United Nations was never designed to solve the problem of a collision between great Powers. Its constitutional system assumed what all constitutional systems assume, namely, a large measure of agreement on the basic rules of the game which alone can make successful a body politic. The servants of that institution have suffered the accidents of an era that is neither peace nor war but rather a continuing challenge to survive the political and military temptations of the atomic age.

¹³⁵ UNESCO Doc. 30/ADM/14 (Aug. 30, 1954), Personnel Policy, Obligations and Rights of Staff Members: Proposed Amendments to the Staff Regulations; and also General Conference resolution adopting amendments similar to those passed by the U.N. Eighth General Assembly, 30/ADM/35 (Prov.) (Feb. 6, 1954), pp. 22-23.

THE CHINESE RECOGNITION PROBLEM

BY QUINCY WRIGHT

Of the Board of Editors

In a press conference of January 19, 1955, President Eisenhower envisaged the possibility of settling the problem of China by recognizing the existence of "two Chinas"—mainland China, on the one hand, and Formosa and the Pescadores, on the other—and promoting a non-aggression agreement between them. From the point of view of international law this suggestion involves consideration of (1) the *de facto* situation, (2) the law of recognition, and the application of that law (3) to mainland China, (4) to Formosa and the Pescadores, and (5) in American traditions. Apart from considerations of fact and law, considerations of present national interest and opinion are important. These considerations will not be discussed here except insofar as they are implied by considerations of fact and law. (It is believed that it is usually in the national interest to observe international law.) Such observance maintains national reputation, which is the major element in obtaining and retaining friends and allies, and support of the United Nations. Furthermore, international law, accepted by the Family of Nations as a whole, rests upon values which transcend those of the particular nation and upon an experience which transcends that of the particular case. It therefore provides a more useful guide to the foreign policy-maker than national law and opinion.

The foreign policy-maker must be aware of the prevailing culture, ideology, and opinion at home giving evidence of the values defining national interests, but it is even more important that he have accurate knowledge of the conditions of opinion and power abroad without which it is impossible for him to appraise the consequences of alternative decisions upon the realization of those interests. Foreign policy differs from domestic policy in that its implementation depends on conditions little subject to the control of national law and little understood by the national public. Foreign policy must, therefore, often adapt to conditions which public opinion chooses to ignore or of which it is unaware. Domestic policy, on the other hand, can usually control the essential conditions if based upon a sufficiently strong public opinion. For this reason, in foreign policy-making, the Executive with superior information on world conditions must play a larger role than the legislature primarily influenced by domestic opinions, at least until public education in international relations is far more advanced than it is today.

ARTHUR D. LEAH, United States Foreign Policy Advisor, 35 Foreign Affairs 360 F. (1955)

(The Communists have been able to win control of substantial mainland China by the end of 1949, and has apparently increased effectiveness of their control of that area. There is no evidence of significant movements for revolt among the people. On the contrary, the points to an increase in economic productivity, progress in the sanitation, relative political stability, and to effective military force, covered by the Peking government in mainland China, than those matters more evidence would be desirable.) The Communist

2. The accidental disclosure of the Banfill Table Conference in America toward China, said in the Department of State in October, 1949, among other officials, business men, and educators with direct knowledge of China, was made in October, 1901. The participants were over half the Communist government was to take over China, that it would deal with a quiescence of the people, and should be organized like the United States, though there were some differences in the advisability of delaying recognition as a bargaining matter as to securing favorable chance to develop in the United States. See p. 410 ff., especially of William H. Hovell, "Insulting General Electric Co.", p. 422. The American Policy toward China published by the New York Council on Foreign Relations in March, 1950, and its British recognition of the Communist government of North Korea, both of which formulated the opinion of 720 leading American lawyers, educators, journalists and others in all large cities distributed across the States. On the proposition of Chinese military opposition to the Chinese Government for the command of China has come to a end. 91% agreed, 8% disagreed, 1% disagreed on the proposition. The result of the civil war in China and the present situation of Chinese processes, 65% agreed, 14% were undecided, 19% disagreed. On the question of the United States and the recognition of Communist China, the majority provided acceptable guarantees against five years of peace, and also to allow our China's treaty obligations of 1942-43, and the American signed up to 1941, 37%. See also Table 4. A government document in 1950, by Henry L. Bretton and George W. Taylor, "The United States and China," pp. 15-17, speaks of American understanding and policy.

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ment was recognized as the government of China before the outbreak of Korean hostilities in June, 1950, by sixteen Members of the United Nations (Afghanistan, Burma, Byelorussia, Czechoslovakia, Denmark, India, Israel, Netherlands, Norway, Pakistan, Poland, Sweden, Sri Lanka, United Kingdom, U.S.S.R. and Yugoslavia) and by eleven non-member states (Albania, Bulgaria, Ceylon, Finland, Eastern Germany, Hungary, North Korea, Mongolia, Romania, Switzerland, and Viet Minh). Indonesia was recognized subsequently. Of these twenty-eight states, thirteen belong to the Communist group of states. Of the fifteen states not allied with the Soviet Union, eight are European and seven Asiatic.

The area controlled by the Communist government includes the entire territory of China as it existed before World War II with the exception of Outer Mongolia, the independence of which that government has recognized, and a few small islands off the coast near Amoy (Quemoy and Matsu), which were still occupied by the Nationalists in July of 1955. In addition, the Communist government appears to have strengthened its control of Tibet and Sinkiang, whose status as parts of China was nominal.

January, 1955: "The streets are reported to be cleaner and there have been spotty advances in public health. . . . There have been some advances in industrial recovery and in new industrial enterprises. . . . It would be a mistake to assume that there is not tremendous force behind the so-called 'New China.' Most of this force derives from the energy of the true Asian revolution, which in China has been captured and interpreted and generously harnessed by communism. . . . But force is not enough. The Chinese Communist regime, while it has certainly brought to the Chinese national identity by its lawless acts, has managed to get very much into the sunlight and with Soviet help has achieved a military potential of meaning proportions. . . . Even those Chinese who in their hearts oppose the regime must not become satisfied with this prestige, even though they may have finally concluded that it be attained by more honorable means." 32 Dept. of State Bulletin 6-7, 1955. In an address of March 21, 1955, Secretary of State Dulles, while regretting Chinese Communist "indecision" with "successes" and their apparently exaggerated opinion of their actual power, position, received an interesting analysis of "concerns flowing from the military and political consolidation of China since 1949," involved conquest of the China Mainland" in 1949. Ibid. at 551. Utilizing available statistics Alexander Eckstein concludes: "The Chinese economy--after being more or less stationary for centuries--with only partial and partial spurts of growth in recent decades--seems to be entering, for better or for worse, a self-sustaining growth process. . . . Conditions and prospects for Economic Growth in Communist China," World Affairs 124 (1960). W. W. Williams and Associates, in *The Prospects of Communist China* (New York: Wiley, 1960), support the above points with extensive analysis, pp. 171-272. For a well-balanced summary of the economic, social, cultural, administrative, and political problems and underlying continuance of the regime, see *China* (1961), pp. 1-23. Though not endorsing the prospects on the whole favorable to note, the limited energy and success of the regime are set out after a generation or so of its rule in the case of the Mainland, 25-300 F.O., Sin (559-613 A.D.) and Yuan (25-300 A.D.) Streets, pp. 120.

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the war, it appears that the dominant government is a general government of some kind in the sense used in the *Tropico Oriental* case. In the traditional practice of states, Practice does not demand that a government whose predecessors still holds out in war be considered a successor.

(Formosa and the Pescadores were annexed by Japan in 1896 as a result of the war with China, and continued part of the Japanese Empire *de jure* and *de facto* until the withdrawal of Japan following its surrender in 1945, and *de jure* until renounced by Japan in the Treaty of Peace of 1951. These islands were occupied by the government of Chiang Kai-Shek in 1945 in pursuance of the Cairo Declaration of 1943. The Nationalist Government from which Chiang had temporarily retired, evacuated mainland China and established its headquarters in Formosa in December, 1949. It has subsequently increased its political and military control of Formosa and the Pescadores since, and there is no evidence of widespread dissatisfaction there. The United States and most other governments which have not recognized the Communist government of China continue to recognize the Government of Chiang Kai-Shek as the Government of China and that government continues to represent China in most of the United Nations and its specialized agencies. The government is now *de facto* the government of only of Formosa and the Pescadores and of some of the small islands on the mainland coast opposite Formosa.

Chinese and Japanese have clustered in some of these small islands, but substantially the Communist Government is the de facto government. On the other hand, the Nationalist Government is the de facto Government of the portion of Japanese territory of Formosa and the Pescadore Islands. There are no foreign governments over these areas populated by people of any race. China with a population of 3,857,000,000, a land area of nearly 4,000,000 square miles and a population of nearly 4,000,000,000 and Japan with a land area of 377,000 square miles and a population of about 10,000,000.

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II. THE LAW CONCERNING RECOGNITION

International law leaves considerable discretion to states in recognizing new states and governments. In principle, recognition is *declaratory* of facts which under international law constitute the status in question, but, because these facts are usually so uncertain that international law cannot be applied automatically, and because states may promote their policies by recognizing facts not yet established or by refusing to recognize facts which are at the moment established, recognition may, in practice, be in considerable measure *constitutive* of that status. General recognition is deemed to be sufficient evidence of the fact, nevertheless.

The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a state (or of a government) is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty.

In accord with this principle international law forbids premature recognition of an insurgent or revolutionary government and, apart from the Stimson doctrine, forbids continued non-recognition of a firmly established government. Between the initiation of revolt by a faction and its firm establishment as a government considerable time may elapse and there may also be differences of opinion as to the evidence of firm establishment. Does the evidence indicate sufficient consent of the governed and sufficient respect for national traditions to make internal revolt unlikely? Does it indicate sufficient avoidance of inhumanities shocking to the conscience of mankind and sufficient respect for international law to make external invasion unlikely? How much is sufficient?

According to the Stimson doctrine there is a duty not to recognize a new regime established not primarily by internal action but by the action of another state in violation of its international obligations of aggression and self-determination.

In the League of Nations study of the Japanese aggression in Manchuria, and in the United States study of the Japanese aggression in China, the problem was faced

population of Formosa in China who came to Formosa, but consists mainly of Chinese who were

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at approximating the relative importance of these forces in both the origin and maintenance of the new regime.¹⁰

There is a difference in the sufficiency of evidence permitting or requiring recognition of a new government and of a new state. A revolutionary government of an old state, once it gains control of the territory, is usually opposed by no more than a government in exile which lacks both power and rights. But an insurgent government of a new state faces the government of the parent state which usually has considerable power to support its claim of right. In the latter case, therefore, states are more cautious in recognizing the change. Premature recognition will be regarded as intervention by the parent state which may declare war, as Great Britain against France when the latter recognized the United States in 1778 and as Spain against the United States when the latter recognized Cuba in 1898. Recognition of a new state is therefore more *constitutive* and less merely *declaratory* than is the recognition of a new government of an old state.¹¹

Admitting the relativity and frequent inconclusiveness of the evidence that a revolutionary government is firmly established, the criteria on which evidence may be sought are usually classified as (1) effective control of the administrative and territory at the moment and (2) expectation that this control will continue for a considerable time.

• The first criterion does not present serious problems. Is there an organized government? Does it have civil and military agencies in all parts of the territory? Do they carry out its orders? Are they sufficient to maintain order? Are there centers of resistance in the territory? Is there any opposition? What are their activities?

tolerance is a pre-condition of the new order, there can be no doubt but that the degree of this breach is not only legally but also culturally, has relevance to judging the prospects for the persistence of the new order. An extremely radical revolution is less likely to persist than a more moderate one.

(The attitude of the people is also significant.) While (consent of the governed may be a formal prerequisite of recognition) though the United States has commonly asserted that it is "there can be no doubt but that the people" varying from such acquiescence to satisfied acceptance and enthusiastic acclamation, is relevant to judging the prospects of a government. The cradence of such attitudes, varying from casual co-

in League of Nations. Appeal of the Chinese Government, Report of the Commission of Enquiry, 1938, pp. 26 ff., 107 ff., 121; Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 1947, Vol. I, pp. 1-12, 13-14, 15-16, 17-18, 19-20, 21-22, 23-24, 25-26, 27-28, 29-30, 31-32, 33-34, 35-36, 37-38, 39-40, 41-42, 43-44, 45-46, 47-48, 49-50, 51-52, 53-54, 55-56, 57-58, 59-60, 61-62, 63-64, 65-66, 67-68, 69-70, 71-72, 73-74, 75-76, 77-78, 79-80, 81-82, 83-84, 85-86, 87-88, 89-90, 91-92, 93-94, 95-96, 97-98, 99-100, 101-102, 103-104, 105-106, 107-108, 109-110, 111-112, 113-114, 115-116, 117-118, 119-120, 121-122, 123-124, 125-126, 127-128, 129-130, 131-132, 133-134, 135-136, 137-138, 139-140, 141-142, 143-144, 145-146, 147-148, 149-150, 151-152, 153-154, 155-156, 157-158, 159-160, 161-162, 163-164, 165-166, 167-168, 169-170, 171-172, 173-174, 175-176, 177-178, 179-180, 181-182, 183-184, 185-186, 187-188, 189-190, 191-192, 193-194, 195-196, 197-198, 199-200, 201-202, 203-204, 205-206, 207-208, 209-210, 211-212, 213-214, 215-216, 217-218, 219-220, 221-222, 223-224, 225-226, 227-228, 229-230, 231-232, 233-234, 235-236, 237-238, 239-240, 241-242, 243-244, 245-246, 247-248, 249-250, 251-252, 253-254, 255-256, 257-258, 259-260, 261-262, 263-264, 265-266, 267-268, 269-270, 271-272, 273-274, 275-276, 277-278, 279-280, 281-282, 283-284, 285-286, 287-288, 289-290, 291-292, 293-294, 295-296, 297-298, 299-300, 301-302, 303-304, 305-306, 307-308, 309-310, 311-312, 313-314, 315-316, 317-318, 319-320, 321-322, 323-324, 325-326, 327-328, 329-330, 331-332, 333-334, 335-336, 337-338, 339-340, 341-342, 343-344, 345-346, 347-348, 349-350, 351-352, 353-354, 355-356, 357-358, 359-360, 361-362, 363-364, 365-366, 367-368, 369-370, 371-372, 373-374, 375-376, 377-378, 379-380, 381-382, 383-384, 385-386, 387-388, 389-390, 391-392, 393-394, 395-396, 397-398, 399-400, 401-402, 403-404, 405-406, 407-408, 409-410, 411-412, 413-414, 415-416, 417-418, 419-420, 421-422, 423-424, 425-426, 427-428, 429-430, 431-432, 433-434, 435-436, 437-438, 439-440, 441-442, 443-444, 445-446, 447-448, 449-450, 451-452, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 465-466, 467-468, 469-470, 471-472, 473-474, 475-476, 477-478, 479-480, 481-482, 483-484, 485-486, 487-488, 489-490, 491-492, 493-494, 495-496, 497-498, 499-500, 501-502, 503-504, 505-506, 507-508, 509-510, 511-512, 513-514, 515-516, 517-518, 519-520, 521-522, 523-524, 525-526, 527-528, 529-530, 531-532, 533-534, 535-536, 537-538, 539-540, 541-542, 543-544, 545-546, 547-548, 549-550, 551-552, 553-554, 555-556, 557-558, 559-560, 561-562, 563-564, 565-566, 567-568, 569-570, 571-572, 573-574, 575-576, 577-578, 579-580, 581-582, 583-584, 585-586, 587-588, 589-590, 591-592, 593-594, 595-596, 597-598, 599-600, 601-602, 603-604, 605-606, 607-608, 609-610, 611-612, 613-614, 615-616, 617-618, 619-620, 621-622, 623-624, 625-626, 627-628, 629-630, 631-632, 633-634, 635-636, 637-638, 639-640, 641-642, 643-644, 645-646, 647-648, 649-650, 651-652, 653-654, 655-656, 657-658, 659-660, 661-662, 663-664, 665-666, 667-668, 669-670, 671-672, 673-674, 675-676, 677-678, 679-680, 681-682, 683-684, 685-686, 687-688, 689-690, 691-692, 693-694, 695-696, 697-698, 699-700, 701-702, 703-704, 705-706, 707-708, 709-710, 711-712, 713-714, 715-716, 717-718, 719-720, 721-722, 723-724, 725-726, 727-728, 729-730, 731-732, 733-734, 735-736, 737-738, 739-740, 741-742, 743-744, 745-746, 747-748, 749-750, 751-752, 753-754, 755-756, 757-758, 759-760, 761-762, 763-764, 765-766, 767-768, 769-770, 771-772, 773-774, 775-776, 777-778, 779-780, 781-782, 783-784, 785-786, 787-788, 789-790, 791-792, 793-794, 795-796, 797-798, 799-800, 801-802, 803-804, 805-806, 807-808, 809-810, 811-812, 813-814, 815-816, 817-818, 819-820, 821-822, 823-824, 825-826, 827-828, 829-830, 831-832, 833-834, 835-836, 837-838, 839-840, 841-842, 843-844, 845-846, 847-848, 849-850, 851-852, 853-854, 855-856, 857-858, 859-860, 861-862, 863-864, 865-866, 867-868, 869-870, 871-872, 873-874, 875-876, 877-878, 879-880, 881-882, 883-884, 885-886, 887-888, 889-890, 891-892, 893-894, 895-896, 897-898, 899-900, 901-902, 903-904, 905-906, 907-908, 909-910, 911-912, 913-914, 915-916, 917-918, 919-920, 921-922, 923-92

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servation by persons in the area and elections controlled by the new government to scientific studies and free and fair elections under impartial international control, must also be scrutinized, without neglecting the relation of a particular procedure for determining attitudes to the culture and customs of the people. Publicly expressed opinions or even votes with formally secret ballots may depart very far from indicating genuine attitudes, especially under the disturbed conditions of revolution.

While recognition of a new government of an old state implies that there has been a breach in the constitutional order, it does not imply that there has been a breach in the international order. It is assumed that the new government will observe the obligations of the state under international law, and usually governments seeking recognition loudly assert their intention to do so. Sometimes such governments have set forth interpretations of international law which are debatable, but only rarely have they repudiated international law altogether.

(The Soviet Government in its early days characterized international law as a capitalistic institution to be superseded by Marxist dialectical materialism, and denied any obligation to pay debts of the Russian state or to respect foreign property in Russian territory.) These pronouncements were made the basis for non-recognition by the United States, thus asserting that respect for international law is a separate criterion for recognition, added to firm establishment in the present and probable future. (The United Nations Charter sets out as criteria of admission of new members "the ability and willingness to observe international obligations.") The prevailing practice, however, has been to regard the applicant government's attitude toward international law, not as a separate criterion, but as evidence of the probable persistence of that government. It is assumed that a government which ignores international obligations is likely to invite reprisals and interventions jeopardizing its existence. Thus, if a government is established with sufficient firmness to assure its ability to fulfill international obligations, it is usually assumed that its will to do so can be assured by the normal sanctions of international law once it functions as a recognized member of the community of nations. It is to be noted that after recognition the Soviet Union withdrew its earlier repudiation of international law, even though it continued to interpret its international obligations in a manner frequently unacceptable to other states.

The same position has generally been taken in regard to atrocities and inhumanities committed by a government in its rise to power. Revolution is usually accompanied by violence, but assassinations and massacres of unusual magnitude have sometimes been made a reason for non-recognition. Here again the tendency has been, not to consider standards of morals or civilization as independent criteria for recognition, but as evidence of the probable persistence of the government. A government which initially shocks the conscience by its brutality invites investigation as

much as does government. But it is the more formal international law.

According to the Stimson doctrine, states are obliged to withhold recognition of territorial changes effected by illegal aggression, but this is hardly applicable to the recognition of new governments not involving territorial change and has not been considered applicable to collective recognition. There can be no doubt of the capacity of the community of nations as a whole to recognize territorial changes through collective action. The duty to recognize fruits of aggression is owed by states individually to victims of aggression and to the community of nations, not to the community as a whole, which is not precluded from utilizing its legislative authority to vindicate and accomplish its duty. The principle *ex injuria non oritur* and even individual recognition, but the principle *ex facto oritur* applies to collective recognition. The community of nations eventually has to choose between accommodating law to facts, and if it chooses to give the facts to vindicate pre-existing law, it must vindicate the law or risks under it to reestablish the jural order in conformity with the facts. Lauterpacht points out:

International law being a weak law is fully exposed to the impact of the elements which jurists have referred as the "law-creating influence of facts." But unless law is to become a convenient code made to order, it must steer a middle course between the law-creating influence of facts and the principle which is the essence of law. Its validity is precarious to individual acts of lawlessness. Law is only able to despatch under the aegis of a system of force and co-operation of society. This does not mean that all breaches of the law are to be treated as the part of the legal order. A balance must be achieved and kept. It cannot be found in the immediate validity of the legal act; it must be sought in considerations of a general nature which would justify the treatment in incorporating the result of the illegality as part of the law.²⁷

THE GOVERNMENT OF CHINA

The Nationalist Government has sought to invoke the Stimson doctrine to recognize the Nationalist Government as the government of China, and that the latter's support is due to aggression by the Soviet Union, violation of its treaties with China, and of the United Nations Charter. It has also sought to have the Nationalist Government recognized by the General Assembly of the United Nations on November 22, 1949. The Soviet Union has violated its obligations under the Charter and treaties with China in assisting the Chinese Communists. The Nationalist Government has urged that the members of the United Nations should not give aid or recognition to the Communist government. The General Assembly has not yet taken any action, but passed a resolution calling upon the members of the United Nations to refrain from recognizing the Communist government.

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Members of the United Nations to respect the independence of China, the principles of the United Nations, and treaties relating to China. Subsequently the representative of the Nationalist Government introduced a resolution declaring that the Soviet Union had violated its treaties with China in aiding the Chinese Communists, but omitted reference to obligations under the Charter and to non-recognition. This was passed by the General Assembly on February 1, 1952.¹⁹ [The General Assembly] therefore, while asserting that the Soviet Union has violated its treaty obligations, appears to consider that the Stimson doctrine is not applicable to the situation in China. [The acquisition of control by the Communist government was in its opinion a manifestation of the self-determination of the Chinese people rather than a manifestation of aggression by the Soviet Union.] The states which have recognized the Communist government have acted in accord with this opinion. In fact the China White Paper presented by the Secretary of State to the President of the United States on July 30, 1949, gives strong support to this opinion,²⁰ as does the Round Table Conference on American Policy toward China, held in the Department of State from October 6 to 8, 1949.²¹

[Even if it were assumed that the illegal Soviet assistance to the Communists was the decisive factor in the success of the latter in China, there is a question of the extent to which the Stimson doctrine would be applicable if the Communist government is firmly established with consent of the people.] That doctrine forbids recognition of territorial change—whether effected by the *de facto* establishment of new states like "Manchukuo" or by *de facto* annexations as of Ethiopia by Italy and of Austria by Germany—when the change has resulted from external aggression without substantial support of the inhabitants of the area. In such cases the state deprived of territory, as China in the "Manchukuo" case, and the states whose security is jeopardized by changes in the balance of power resulting from annexations, should be free to rectify the situation which has been established by illegal action, and consequently the fruits of aggression should not be recognized. The states whose recognition is necessary to validate these changes should withhold recognition.²²

[When, however, a new government is established in an old state, neither of these circumstances exists, even though some outside aid was given to the revolutionists.] The change is primarily in the constitutional, not in the international, order. Convenience requires that states be represented by a government. (Consequently international law favors recognition of a

¹⁹ *Ibid.* (1949-1950) 298.

²⁰ *Ibid.* (1951) 264.

²¹ United States Relations with China with special reference to the Period 1944-1949 (Department of State, Washington, D. C., August, 1949). Secretary of State Acheson summarized this voluminous material: "It [the Communist revolution in China] was the product of internal forces, forces which this country tried to influence but could not. A decision was arrived at within China, if only a decision by default." *Op. cit.* p. 1.

²² Note 2 *supra*.

²³ Virginia Beach Memorandum, note 15 *supra*; Lauterpacht, *Recognition* 428 ff.; Beem, "Non-Recognition: A Reconsideration," 22 *University of Chicago Law Review* 277 (1954).

side, such as Germany, Yugoslavia and Poland, which have not
state over the two northern provinces of the Silesian voivodeship
different to the east and so have not to result in the
autonomy government of a part of the territory. It has been
that this was the situation resulting from the Communist revolution
Czechoslovakia, in China, and in other Communist states. The
policy of the stimulus to the revolution in such cases would depend
the influence of outside aid on the success of the revolution. The
lack of independence of the state after the revolution as a result
aid and other circumstances.

It is less me that the Communist government of China is the *de facto* government, the Soviet doctrine would not be applied. The argument given by the Soviet Union was not only contrary to the policy of the Soviet Government, but also to the Government of China. It had resulted in a virtual recognition of China by the Soviet Government. China continues an independent state, the Communist government is not the *de facto* government, and would seem entitled to recognize the

[The conclusion seemed to flow from his memorandum proposing that the Secretary General of the United Nations on March 8, 1955, in his memorandum suggested that apart from individual recognition of the Government of the United Nations, the credentials of representatives of rival governments of a Member State should be given only to a representative performing an official function. The implication was that the United Nations only the Government Government could perform an official function.]

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tunity to resolve this situation: first by withdrawing its representatives from United Nations organs and subsequently by sanctioning aggression in Korea.) These pressures made it difficult for the United Nations to admit Communist China's representation. The Korean incident of June, 1950, did, however, induce President Truman, as a precautionary measure, to order the 7th Fleet to prevent hostilities by either the Communist or the Nationalist Chinese governments in the Formosa Straits. This looked toward recognition of two Chinas. The act of the Eisenhower Administration on February 2, 1953, in modifying this order to permit the Nationalists to attack the mainland ended this implication symbolically, though it made little change practically.

The action of the Communist government of China in the Autumn of 1950, in permitting, and indeed encouraging, "volunteers" from China to participate in the North Korean aggression raised a new issue as to the responsibility and stability of that government, thus justifying the states in further delaying recognition and representation in the United Nations. The conclusion of the armistice on July 27, 1953, again modified the situation. The negotiations which led to the armistice, and the armistice provisions calling for a political conference of "both sides" to conclude peace, seemed to recognize first, that the Communist government of China was a belligerent on one side in the hostilities and capable of being a party to an armistice, and second, that the other side in these hostilities, construed to mean the Republic of Korea, the United States and the other members of the United Nations engaged in direct hostilities in Korea, potentially recognized that government as the government of a state capable of entering into a political treaty. The United States, particularly, was insistent that the political conference must be located in a conference of "two sides" and thus seemed to imply that if the negotiations were successful, it would enter into a political treaty with Communist China. Such an act would normally constitute recognition.²⁷ The Communist government of China seemed to have assumed that the Geneva Conference, which assembled in the Spring of 1954 for such a negotiation, constituted recognition in this sense. The United States sought to avoid such an implication by declining either to sign or to endorse the agreements reached pertaining to China. No agreements were reached concerning Korea. The presence of Communist China at the conference, inescapably, added prestige to the Communist government.²⁸

The Secretary General of the United Nations at Peking in pursuance of a General Assembly resolution to discuss American and other personnel of the United Nations Committee on the Straits of Formosa by the Peking government,²⁹ and the invitation extended on January 31, 1955, by the Secretary General of the Security Council resolution, to discuss the Security Council resolution on the Straits of Formosa, looked toward recognition

²⁷ *supra* note 204 (1953). ²⁸ *United Nations Yearbook of International Law*, 1953, at 10.

²⁹ *id.* at 3.

(February, 1955).

of the Peking government by the United Nations. The refusal of the Peking government to accept the latter invitation was not an indication that the government of China was at least unopposed to it.

The foregoing discussion suggests that the states of the world and the United Nations have gone far toward recognizing the Communist government as the government of China and that from this point of view of international law, such recognition is to be expected. In this respect, John Foster Dulles wrote in 1950 before becoming Secretary of State:

If the Communist government of China in fact proves its ability to govern China without serious domestic resistance, then it will be admitted to the United Nations. However, to assume that it claims to have become the government of a country through civil war should not be recognized until it has been tested over a reasonable period of time.

²⁰ *Ibid.* 5 (March, 1955). The resolution introduced by New Zealand was mostly approved except for the negative vote of China and the abstention of the Soviet Union.

²¹ Following this refusal, the Soviet Union proposed inclusion of the "Communist representative" of China, but the Council approved unanimously, with exception of the Soviet Union, a United States resolution not to consider a change of Chinese representation at this time. The British representative, supported by the French representative, said the question of China's representation in the United Nations would have to be settled before peaceful and friendly relations could be established between the various governments with interests in the Far East, but discussion of the question in the United Nations would do "more harm than good" while the votes of the members were evidently so deeply divided on this issue. His support of the United States resolution did not mean that the question should never be considered but that "the existing circumstances were not propitious." *Ibid.* 6.

²² *War or Peace* (New York, Macmillan, 1950), 130. In hearings before the United Committee on Review of the United Nations Charter in January, 1954, Secretary of State Dulles expressed the opinion that the National Government "expressed the true aspirations and hopes of the Chinese people." 33rd Cong. 2nd Sess. Hearings, 21, 22, 20. After detailed study of the question of Chinese representation in the United Nations, Herbert V. Briggs concluded in March, 1952, "When peace is restored in Korea, it may be easier to recognize that neither the National Government nor the United Nations nor the interests of a member containing two major groups of the world's population can be served by disregarding the fundamental principle that the government in effective control of China is the Chinese Communist Government." 6 International Organization 209 (1952).

²³ Conceding that October, 1950, was "one of the most difficult and complex" times in the history of the United Nations, the Secretary of State, Charles E. McNamara, urged that "the issue of international law be considered—whether the will of the people of China has been expressed fairly and in favor of that government, and whether that government is in a position to serve international law." *The Recognition of the Communist Government*, 21 *Int'l L. Q.* 666 (1953).

²⁴ Quoting President Eisenhower's address in January, 1955, the *Washington Post* (January, 1955) stated that the issue of the recognition of the Communist government "is a question of international law." The *Washington Post* (January, 1955) suggested that "the Communist government is not a state under international law and should not be recognized." *The Washington Post* (January, 1955) 1, 2. The opinions of Paul S. Gorman, *Foreign Affairs* (February, 1955) 1, 2, and the opinions of Paul S. Gorman, *Foreign Affairs* (February, 1955) 1, 2, appear to be very close to the views of the United States government.

²⁵ Such an interpretation depends upon the view of the United States government of the state which emerged after the Peace of Westphalia and which is the basis of the

IV. THE GOVERNMENT OF FORMOSA

[The Communist government of China claims that Formosa and the Pescadores are part of China on the basis of ancient historical dominion, the predominantly Chinese character of the population, and the Cairo Declaration of December 1, 1943, by which Roosevelt, Churchill and Chiang Kai-Shek agreed, "that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China."³² The Potsdam Declaration of July 26, 1945, made originally by the same three countries, but later accepted by the Soviet Union, was accepted by Japan as the basis of its surrender on August 14, 1945. This Declaration asserted that "the terms of the Cairo Declaration shall be carried out."³³ On the basis of this pronouncement China occupied Formosa and the Pescadores in 1945.]

If it were assumed that the Japanese surrender constituted a definitive renunciation of Formosa and the Pescadores and that the Chinese occupation constituted definitive re-annexation of these territories by China, then the Communist government, if recognized as the government of China, would have a legal claim to these islands. Two objections can be made to this conclusion. First, the Japanese surrender was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace. In that treaty, signed in San Francisco, September 8, 1951, after the Communist government was in control of China and without the signature of either of the rival governments of China, Japan did "renounce all rights, titles and claims" to these islands, but the beneficiary of this renunciation was not stated.³⁴ It would appear, therefore, that the claims of the *de facto* occupant, the government of Chiang Kai-Shek, were acquiesced in, perhaps subject to ultimate validation by the Allied Powers with whom Japan concluded the treaty. These 48 states included the United States, the United Kingdom and France but not the Soviet Union or China. No definitive action by the signatory states has been taken, though the United States on December 2, 1954, signed a treaty with the "Republic of China," represented by the Nationalist Government, guaranteeing these islands against attack.³⁵ A note attached to the treaty commits the Government of the "Republic of China" not to "use force" from Formosa, the Pescadores or "the other territory" which it controls.

modern international law from the natural law of the Middle Ages. The ascendancy of modern international law to subordinate ideological differences to territorial sovereignty has, however, been influenced by the principles of democratic liberalism adopted by the United Nations Charter, tending to subordinate territorial sovereignty to human rights. It would appear that international law is in need of a universally acceptable "public philosophy" or "natural law" reconciling the rights of man and the rights of states. Cf. O. Wright, "International Law and Ideologies," 43 A.J.I.L. 611 (1949). See also J. J. van Marum, *The Public Philosophy* (Boston, Little, Brown, 1953); H. Kelsen, *Rechtslehre als die Lehre vom Gesetz* (New York, New York, 1954).

³² Art. IV, 40 A.J.I.L. Supp. 22 (1943). The treaty went into effect on September 28, 1945. Japan made a separate treaty with Chiang's China, also renouncing Formosa and the Pescadores, in force August 5, 1952.

³³ Gen. Exec. A-34 in Cong., 1st Sess. (1955); 31 Dept. of State Bull. 1324 (1954); in force March 2, 1955.

without the consent of the United States. This resolution in the *de facto* situation of two Chinas implicit in the President's message to the 7th. Session June, 1950.

The significance of this treaty is, however, secondary. On the one hand it is said that the designation of the government of China as the Government of "the Republic of China" in this treaty has no effect between Formosa and the mainland would have the character of a settlement between the two Chinese factions. Neither could be construed as an admission since that term in international law implies an international subject and the matter would presumably be within the competence of the Republic of China and outside United Nations control. This position seems to be insisted upon by both the governments claiming to be the governments of China. On the other hand it is said that the accompanying declaration that the term "Republic of China" is a euphemism and the treaty in fact recognizes that Formosa and the Pescadores constitute territory separated from China. With this construction an attack by either upon the other would be an act of aggression. This construction is weakened by the reference to "other territory," apparently referring to coastal islands, and to the Republic of China's "inherent right of self-defense" with respect to "all territory now and hereafter under its control." Secretary Dulles, however, in discussing the treaty at the conference, explicitly stated that the islands denoted by the term had a different "juridical status" from the coastal islands.

A second ground for modifying the inference which the Communist Government draws from the Cairo Declaration flows from the provisions of the United Nations Charter recognizing the principle of self-determination of peoples. The parties to the Japanese Peace Treaty, most of whom are Members of the United Nations, are free under the Charter, which is legally prevalent over the Cairo Declaration,²² to expect of Formosa and the Pescadores according to the principle of self-determination a restoration to China according to the policy declared in the Charter. These considerations suggest that there is no room for a resolution which would prevent the parties to the Japanese Peace Treaty from recognizing the government of Formosa as the government of a new state of Formosa and that such a resolution is in the wishes of the inhabitants of these islands.

V. AMERICAN TRADE POLICY

The United States has played an important role in the development of international law for the stated principles of the Charter.

²² U.N. Charter, Art. 102.

²³ U.N. Charter, Art. 102. The Charter is the only international instrument which has been signed by all the Members of the United Nations.

²⁴ U.N. Charter, Art. 102. The Charter is the only international instrument which has been signed by all the Members of the United Nations.

tion and *de facto* recognition.) It declared its own independence in 1776 and in 1793 promptly recognized the French Revolutionary Government, although the hands of the latter were still fresh with the blood of Louis XVI, whose aid had contributed to realization of that Declaration. On March 12, 1793, Secretary of State Jefferson wrote to Gouverneur Morris, American Minister in Paris:

We surely cannot deny to any nation that right whereon our own government is founded—that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president or anything else it may choose. The will of the nation is the only thing essential to be regarded.⁴¹

A month later President Washington submitted to his cabinet the question of receiving Citizen Genet as representative of the new French Republic. Secretaries Hamilton and Knox thought qualifications should be attached to this reception, but Washington received Genet without qualification.⁴² In pronouncing the Monroe Doctrine a generation later and in promptly recognizing numerous new states and governments during the next century, the United States combated efforts to import concepts of the "legitimacy" or constitutionality of internal changes into international law. Revolution was considered a right whose fruits should be recognized when firmly established according to the "will of the nation."⁴³

It is true that in the twentieth century there were departures from this principle. (Practices of non-recognition were pursued in Central America, Mexico and other Latin American countries to discourage revolution and promote stability. The prolonged non-recognition of the Soviet Government and the Communist government of China were said to be justified by the repudiation or neglect of obligations under international law by those governments.) The non-recognition of Manchukuo, of Mussolini's conquest of Ethiopia, of Hitler's conquest of Austria, and of Stalin's conquest of the Baltic states was considered a legal obligation flowing from commitments to discourage aggression. (In other cases, premature recognition, as of Cuba (1898), Panama (1903), Czechoslovakia (1918) and Poland (1918), was justified by doubt whether the *de facto* situation corresponded to the will of the people.) In these cases there was some disposition to intervene to assist the realization of that will. In other cases during the interwar period, *de facto* dictatorships were recognized without consideration of popular consent.⁴⁴

International law tolerates or even requires consideration of circumstances which provide evidence of the probable durability of a government established in fact, but it considers the internal history, economy and morality of a government relevant only if they impair its capacity to meet

⁴¹ 1 Moore, Digest of International Law, 120.

⁴² *Ibid.*, at 121.

⁴³ See Lauterpacht, *Recognition*

93 *Am. J. Int. L.* 230 ff.

international responsibilities.³³ To refuse recognition solely because of antipathy to a government's internal practices in these matters constitutes intervention in its domestic jurisdiction. As President Eisenhower said on April 16, 1953:

Any nation's right to a form of government and an economic system of its own choosing is *inalienable*. Any nation's attempt to dictate to other nations their form of government is *indefensible*.³⁴

The United States has in the main adhered to this position established by Washington and Jefferson. Thus Secretary of State Fish said in 1877:

The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself and to discharge its internal duties and its external obligations.³⁵

This position closely accords with the position of contemporary international law on the subject as stated by a leading international lawyer, now judge of the International Court of Justice:

Whenever the requisite conditions of governmental capacity exist recognition is due as a matter of right. Once the revolutionary government may fairly be held to enjoy, with a reasonable prospect of permanency, the obedience of the mass of the population and once it is in effective control of the bulk of the national territory it is entitled to recognition. Its revolutionary origin or the methods of the revolutionary change is irrelevant.³⁶

These principles have been developed in the United States by executive practice and pronouncement. Presidential competence in the field of recognition has been established by both practice and judicial interpretation of the Constitution. In recognizing new governments and belligerents Congress has not been consulted by the President, though in the recognition of new states such consultation has sometimes been requested.³⁷ The practice has tended to minimize the influence of national passions and prejudices and to maximize the influence of international law and the facts of the situation. The Congressional resolution of June, 1953, opposing the representation of Communist China in the United Nations, and the Congressional resolution of January 29, 1955, implying that the coastal island may be associated with Formosa in measures of defense, were among

³³ Q. Wright, *The Control of American Foreign Relations* (New York: Macmillan, 1922) 13-20.

³⁴ 28 Dept. of State Bulletin 593 (1953).

³⁵ 1 Moore, *Digest*, 260.

³⁶ Lamerfaut, *Letter to the London Times*, Jan. 6, 1950, note 9, *supra*.

³⁷ Moore, *op. cit.* at 243; Wright, *Control of American Foreign Relations* 263 ff.

³⁸ Reciting the strategic importance of Formosa and the Pescadore, and authorizes the President to use the armed forces to protect against any attack, this authority to include the securing and protection of such islands, harbors and territories of that area not in friendly hands and the taking of such other measures as he judged to be required or appropriate in assuring the defense of

initiated by the President, run counter to this tradition. Such resolutions, if specific and mandatory, are of doubtful constitutionality and are likely to hamper policies grounded on international law and contributing to national security and international tranquillity.

CONCLUSION

If we assume, as the available evidence suggests, that the Communist and the Nationalist governments are, respectively, established—the one in mainland China and the other in Formosa and the Pescadores—with sufficient administrative efficiency, public support, and respect for international obligations, to make it unlikely that they will be overthrown from internal rebellion or external invasion in any foreseeable future, the following propositions appear to be legal consequences:

1. The United States is free to recognize the Communist government as the government of China and to do so would be in accord with its traditional policy and the normal expectations of international law.

2. The United States is free to recognize Formosa and the Pescadores as an independent state under the Nationalist Government, and to do so would accord with traditional practice and the principles of the United Nations Charter, provided free and fair elections indicate that an independent state of Formosa under the Nationalist Government conforms to the wishes of the inhabitants.

3. While the United States may not be under a positive obligation to recognize the Communist government as the government of China, that government appears to be the general *de facto* government of China, and as such is alone capable of committing China under international law and alone entitled to represent China in international transactions. It would, therefore, appear that the United States should no longer support the representation of China by the Nationalist Government or oppose its representation by the Communist government in the United Nations and the Specialized Agencies.

4. The United States appears to have recognized the Nationalist Government as the government of Formosa and the Pescadores in making a treaty with that state guaranteeing these islands against attack, provided it does not itself launch an attack upon the mainland. It is not believed that the

Formosa and the Pescadores. 32 Dept. of State Bulletin 213 (1955). In an address of Feb. 16, 1955, Secretary of State Dulles said "the continued" "Neutrality" of the coastal islands "would serve the cause of peace or the cause of freedom," adding: "The United States has no commitment and no purpose to defend the coastal positions as such. The basic principle is to assure that Formosa and the Pescadores will not be possibly taken over by the Chinese Communists." He noted "the strategic linkage of the coastal islands with an attack on Formosa by the Communists," and expressed the hope that even though they maintained their claim to Formosa they might renounce the use of force to enforce it. 27 Int. at 829.

4 Edward S. Corwin, *The Constitution and the Foreign Relations* (Princeton University Press, 1917) 3: 332; *Neutrality and Foreign Relations* (Princeton University Press, 1917) 2: 270-273, 273-283; 14 *American Journal of International Law* 151 (1920), 166, 313-315, 315-316, 317-318, 318-319, 319-320, 320-321, 321-322, 322-323, 323-324, 324-325, 325-326, 326-327, 327-328, 328-329, 329-330, 330-331, 331-332, 332-333, 333-334, 334-335, 335-336, 336-337, 337-338, 338-339, 339-340, 340-341, 341-342, 342-343, 343-344, 344-345, 345-346, 346-347, 347-348, 348-349, 349-350, 350-351, 351-352, 352-353, 353-354, 354-355, 355-356, 356-357, 357-358, 358-359, 359-360, 360-361, 361-362, 362-363, 363-364, 364-365, 365-366, 366-367, 367-368, 368-369, 369-370, 370-371, 371-372, 372-373, 373-374, 374-375, 375-376, 376-377, 377-378, 378-379, 379-380, 380-381, 381-382, 382-383, 383-384, 384-385, 385-386, 386-387, 387-388, 388-389, 389-390, 390-391, 391-392, 392-393, 393-394, 394-395, 395-396, 396-397, 397-398, 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State, United States, the international law in this action, though
 referred to the Secretary of this government as the Governor
 of the Republic of China, and to seek further evidence that the
 interests of the Republic of China are approved for the establishment of
 an independent state.

While the Communist government can be admitted to represent China pending the normal process of accepting the credentials of its delegation to the various organs of the United Nations, it would appear that after such recognition, the government of Formosa and the Pescadores can only be represented in the United Nations if it is admitted as the government of a new state by the normal process. This conforms to the practice in the case of India, whose membership continued in the United Nations after the separation of Pakistan, while the latter was admitted as a new state.⁵⁰

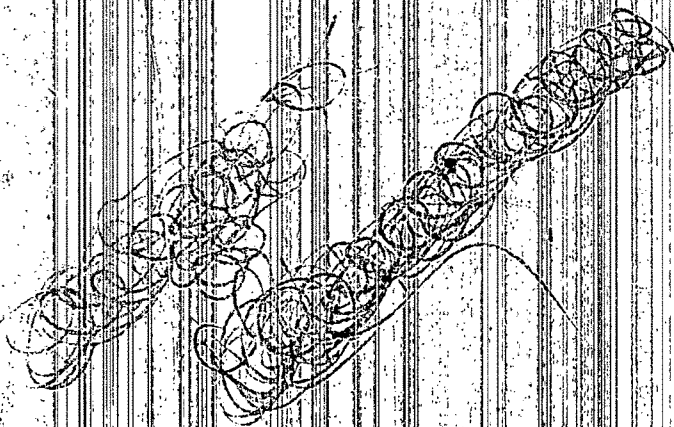
6. The small coastal islands of Quemoy, Matsu, Yumen, Nanki, Pengshan, Tachen, Yixiang and Fushan have always been considered part of the mainland of China. They were not connected with Formosa and the Pescadores when these were under Japanese rule. Their significance is mainly strategic and they appear to be indefensible from mainland attack without attacks on mainland bases. They should be recognized as pertinent to China and evacuated by Nationalist forces. The agreements of the United States with the Formosa Government appear to give a somewhat qualified recognition of this.¹⁴

While the establishment of an independent state of Formosa in peaceful relations with China seems desirable, it may be some time before political conditions will make possible the recognition of that state by China and the Soviet Union, its admittance to the United Nations, and its renuncia-

so Arthur Dean suggests, that even in Communist China is generally recognized, the "Republic of China" or Formosa might be considered the Government of China with title to bank accounts, buildings and other property of "China" abroad, the right to protect Chinese nationals abroad, and a China's seat in the Security Council (loc. cit. *supra* note 1 at 373). With due respect, the present writer would suggest that the *de facto* jurisdiction of the *de facto* government is the bill is not the dog. The government of Formosa is not the government of China. While Chinese abroad might still "Chinese government" are recognized, except for the nationality of other "Formosa", China or Mainland China; and while accommodations might be made in respect to properties abroad acquired in the name of Chiang's "Republic of China", only the government which controls Mainland China would represent China in the United Nations or other international institutions or claim title to public property in China abroad which finally came to Formosa or to Chiang's government. There are still two states, Chinese Formosa would be the new state and the Chinese mainland the old state of China. There was great agreement in the Security Council to recognize the state of Formosa as a territory populated by 60 million people. The state of Formosa could have so. Government China the People's Government (communists) China signed a treaty with the United States in April 22, 1954, giving China a "Treaty of Commerce and Consular Rights" and "Treaty of Friendship, Commerce and Consular Rights" with the United States.

[illegible]

tion of a claim to be the government of China. Political conditions seem more favorable to the general recognition of the Communist government as the government of China and the admittance of its representatives to the organs of the United Nations. Mutual guarantees of non-aggression between China and Formosa might be achieved provisionally even before these states formally recognize each other. A negotiation dealing with all these aspects of the problem might establish a more tranquil situation in the Far East.)



STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW

BY F. V. GARCÍA-AMADOR

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During its eighth regular session, the General Assembly of the United Nations considered "that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified." To this end, the Assembly requested the International Law Commission to undertake the codification of these principles.¹ The Tenth Inter-American Conference, held in Caracas March 1-28, 1954, adopted a similar resolution.² Considering that "The American Continent has made a notable contribution to the development and to the codification of the principles of international law that govern the responsibility of the State," the Conference resolved to entrust the Inter-American Council of Jurists and its Permanent Commission, the Inter-American Juridical Committee of Rio de Janeiro, with the preparation of a study or report on the subject.³

As is true with respect to other topics of international law, the codification of the principles governing state responsibility is not a task that can be confined today to a mere enumeration and systematization of the various legal rules that theory and practice have established on the subject. It is not difficult to understand why this codification cannot be undertaken as a pure and simple restatement of existing rules. (These rules were created and have developed according to some fundamental views and concepts which have undergone a profound transformation in contemporary international law.) In particular this transformation has affected in a very substantial way the traditional view of international personality. And it is quite evident that the traditional concept of the subjects of international law has governed the theory and practice of responsibility, especially as it refers to damages caused to the person or property of aliens. (There are also new concepts regarding the penal responsibility of states and in general with respect to some international obligations which were unknown to traditional law.) In short, the codification of the principles of international

¹ Resolutions adopted by the General Assembly during its Eighth Session, Official Documents Supp. No. 17 (A/2650), Res. 799 (VIII). The resolution was submitted by the Delegation of Cuba in the course of the discussion of a Report of the International Law Commission (*cf.* Docs. A/C. 6/L. 311 and A/C. 6/SE. 394).

² Res. CLV, Final Act of the Tenth Inter-American Conference (Caracas, March, 1954), 48 A.J.I.L. Supp. 128 (1954). This resolution was also submitted by the Delegation of Cuba, which took into account that, according to the pertinent instruments, the relations and co-operation between the International Law Commission and the Inter-American bodies entrusted with the development and codification of international law should be promoted (*cf.* Doc. 247, SG-151).

nationals respect for the rules of international law."⁷ (In consequence of this principle, stateless persons have been deprived of the protection of the rules of "common international law" of aliens, to use the expression devised by the former Permanent Court; despite the fact that they practically possessed that *status* in municipal law. This principle has also given rise to the problems of double or multi-nationality cases. A corollary of the same principle has been that the nature and amount of the reparation claimed have as a rule been determined by the state, not by the individual or legal person injured.)

There would undoubtedly be serious difficulties if an attempt were made to retain this principle and its corollaries, with all their traditional rigidity, in a codification consistent with certain basic postulates of contemporary international law. The international recognition and protection of human rights are facts whose consequences must inevitably affect the right or capacity to bring international claims. Actually, it is very difficult today to maintain the opinion that the state is responsible only with respect to another state; and that in the cases of responsibility for damages to the person or property of aliens there is not a violation of the right of an individual, but merely of the right of the state to insure that such individual be treated in conformity with international law. But in one way or the other, when internationally recognized human rights are at stake, the only and sole possible holder of such rights is the individual because it is precisely to this aim that recognition is granted. In the other hypothesis—such as those of contractual rights—it is only by virtue of a pure fiction, a fiction devised to protect the political prestige and other interests of the state, that one may deny that the true and only subject of those rights is again the individual.

On the other hand, if a solution of the procedural problem of the claim is really (what was) sought, then what should have been done was to recognize in the interested party, in the form and conditions deemed appropriate, a right or procedural remedy. Practice in this respect has been, in a sense, more far-reaching than theory, as is shown by those cases in which an international procedural capacity was granted to private individuals. Reference is made to the *locus standi* which was granted to individuals before the arbitral tribunals set up under Articles 297 and 304 of the Treaty of Versailles, and more particularly to the much more independent position they enjoyed before the Central American Court of Justice and before the Arbitral Tribunal for Upper Silesia set up under the German-Polish Convention of May 15, 1922. The capacity of international civil servants and other persons in respect of the League of Nations and the United Nations Administrative Tribunals are also precedents which are to some extent related to the specific question under discussion. The capacity of the individual directly to acquire international rights, together with the antecedents just mentioned, shows a definite trend of international law, a trend which cannot be ignored when the principles governing state respon-

⁷ P.C.I.J., Ser. A/B, No. 76 (1939) 16.

budgetary provision therefor and that such awards could not be voted by the Assembly.¹²²

The French Government statement came to the conclusion that there was no legal basis for the Assembly refusing to pay the awards except possibly in the unlikely circumstance of financial disability facing the Organization.¹²³ This would be a reason of necessity, not a reason of law, and the French Government admitted that it merely raised the question theoretically and that it had no practical meaning for the present case.

Undoubtedly the arguments before the Court that were most difficult and had to be met were those put forward by the United States in its insistence on the supreme position of the Assembly, both in creating the Tribunal and in being able to destroy it, as well as the Assembly's position as the final arbiter in the expenditure of funds on behalf of the Organization because of the Assembly's power to approve the budget.

It is interesting that the Court was able to overcome both arguments with a good deal of logic and force. As to the supreme position of the Assembly, the Court made it clear that, once the Assembly created an organ, it could not deny the effects which the Statute provided in setting up a United Nations constitutional instrument capable of rendering final and binding judgments. Particularly was this the case when the functions of the organ were to be judicial, functions which the Charter did not vest in the Assembly itself. Again, all of the obligations of the Organization had to be honored by the Organization, and while there may have been a strictly political "power" to refuse to vote the budget or an item therein—although the Court does not spell this out—there was no "legal" right to employ the Assembly's functions in relation to the budget to prevent the payment of a due obligation of the Organization as a whole. In essence, the Court was saying that once a judicial body had been created, its functioning and its awards should be treated as binding in the same way as the decisions of courts under national laws may bind all the organs of the state.¹²⁴

VIII. THE NINTH SESSION AND THE SECRETARIAT

The recent session of the Assembly witnessed the climax of three and a half years of developments in personnel policies and in the difficulties discussed above. The Secretary General presented to the Fifth Committee an interim personnel report outlining the developments since the Eighth General Assembly and the important changes in the Staff Regulations and Rules.¹²⁵ He presented also his Report on the Organization of the Secretariat describing in detail the reorganization of the various departments of the Secretariat and the appointment of a series of Under Secretaries.

¹²² *Ibid.* at 109-110.

¹²³ *Ibid.* at 22.

¹²⁴ *Supra* note 123, at 61. "It is common practice in national constitutional systems with the capacity to render decisions legally binding on the organs which brought them into being."

¹²⁵ Report of the Secretary General on Personnel Policy of the United Nations, U.N. Doc. A/2777; also Report of the Fifth Committee, U.N. Doc. A/2782.

and without departmental responsibilities.¹³³ Finally, the Fifth Committee, largely under the leadership of the United States, examined the question of the International Court's opinion in the *Awards Case* with particular reference to the future status of the Tribunal.¹³⁴

It is not possible to deal in detail with all of these matters. Suffice it to say that the Personnel Report disclosed the fact that the machinery contemplated in administering the extremely delicate grounds for dismissal under Regulation 9.1 (a) had been put into force with the establishment of a special Advisory Board, and that during its first session in mid-1954 only two cases were considered and reported on by it.¹³⁵ The Secretary General promised that he would provide the Tenth Session with a review of the principles and standards developed in the work of the Board as required by the Eighth Session in Resolution 782.¹³⁶ Perhaps most interesting of all was the recent appearance of the Report on Standards of Conduct in International Civil Service prepared by the International Civil Service Advisory Board.¹³⁷ The Secretary General properly stressed the importance of this report and, indeed, in many respects it is a classical statement as to standards of behavior for international civil servants. It is significant that the inflammable question of "loyalty" of the international public servant is approached by the Board's Report in the following forthright language:

... an international outlook . . . flows from understanding of and loyalty to the objective and purposes of the international organization as set forth in its Charter or Constitution. The acceptance of the oath of office and of the basic obligation to serve wholeheartedly and completely the organization's interests needs to be worked out in many directions. It involves willingness to try to understand and be tolerant of different points of view, different cultural patterns, and different work habits. It also entails willingness to work without prejudice or bias with persons of all nationalities, religions and cultures. It means a readiness to be continually conscious of how proposals, events and statements of opinion may appear to a very wide range of nationalities. . . . In fact, the highest type of loyal international civil servant is one who finds that whatever his personal views he can willingly conform to the observance of his international obligations and support the decisions of the international organization he serves. . . . What is essential is not the absence of personal political or national views but rather restraint at all times . . . in the expression of such views.¹³⁸

In the Fifth Committee the United States, supported at first by Argentina and later by Canada, Chile and Turkey,¹³⁹ presented a draft resolution

¹³³ Organization of the Secretariat, Report of the Secretary General, U.N. Doc.

¹³⁴ 1951.

¹³⁵ Report of the Fifth Committee re. Awards of Compensation Made by the United States Tribunal; Advisory Opinion of the International Court of Justice, U.N. Doc.

¹³⁶ 1953.

¹³⁷ *Id.*, op. cit. supra note 132, at 7.

¹³⁸ *Id.*, note 113.

¹³⁹ *Id.*, at 4.

¹⁴⁰ Resolution of Argentina and U. S. A., U.N. Doc. A/C. 5/L. 317, as amended by U.N. Doc. A/C. 5/L. 321, and U.N. Doc. A/C. 5/L. 321, Rev. 1, also Belgian draft, U.N. Doc.

¹⁴¹ 1952.

tion which sought to solve the awards question once and for all by a compromise, which the United States accepted, namely, an authorization to pay the present awards from a newly-established revolving fund, but a decision on principle to accept the theory of a permanent or *ad hoc* judicial body to provide for appeal from or "review of" the Administrative Tribunal's decisions. In the Fifth Committee there seemed to be much confusion of thought and considerable dispute as to the value of these proposals. In the end an inconclusive vote in the Committee led to a resolution rejecting the principle of appeal and establishing only a special committee to study the problem, in addition to now authorizing payments.¹⁴⁰ But when the matter went to the Plenary Session of the Assembly, the principle "of review"—not appeal—was reasserted with success and a special committee was established to examine the problem in 1955, and to report back to the Assembly at the Tenth Session.¹⁴¹

In the debates in the Plenary Session it must be confessed that Senator Fulbright's arguments as to the desirability for a review on principle were not very convincing. He insisted that judicial review procedure would strengthen the relations between the Secretary General and the staff, declaring that

on his side the Secretary-General will have an assurance that the decisions he makes as the chief administrative officer of the Organization will receive the fullest judicial consideration and that his authority laid down in the Charter and the Staff Regulations will be given full legal respect. On their side the staff will have greater assurance that their legal rights and privileges will be observed.¹⁴²

Perhaps one of the strongest arguments against the United States' position was made by Mr. Sapru of India.¹⁴³ He pointed out that Senator Fulbright in the Fifth Committee and elsewhere may have misread the Committee's judgment when he believed the Court recommended the establishment of a judicial review procedure, and in this criticism he seems quite correct.

It now remains for the seventeen named member countries¹⁴⁴ to present a time to be fixed in consultation with the Secretary General and to report back to the Fifth Committee at the Tenth Session.

IX. CONCLUSIONS

Since it is now possible to view this long and complex development in some perspective, the following observations seem relevant:

1. The International civil service represented particularly by the United Nations Secretariat has undergone quite severe psychological and administrative distress as a result of allegations concerning its integrity, of claims of espionage and the over-dramatized significance of cases of personnel who refused to testify before United States Senate committees, Federal Grand Juries; of the lack of a clearly defined policy by the

¹⁴⁰ *Ibid.* supra note 133, at 16-19.

¹⁴¹ U.N. Doc. A/L. 102.

¹⁴² Provisional Record, U. N. Doc. A/P.V. 515, at p. 18.

¹⁴³ *Ibid.*, at 21-23.

¹⁴⁴ *Ibid.*, at 46.

ization is dealing with the pressures brought to bear upon it by the outside world; and finally, of the reorganization and weeding-out processes that have been taking place during the past two or three years, first under the Walters Committee and recently in the reorganization sponsored by the present Secretary General. Nevertheless, out of all of this strain has come some good. It at least has led Member States to define for themselves the constitutional position of the Organization, the Secretariat, and the General Assembly in dealing with staff matters as well as host and Member State relations. And that clarification should lead to greater stability internally as well as in relations of the Organization to all states.

Greater clarification has come also to the question of the so-called competing loyalties affecting the international staff member. Men are capable of varieties of loyalties and it is a misuse of the term to confine its application to national political allegiance alone. There is no necessary conflict in loyalties between the civil servant's international responsibilities and his proper national obligations. There may well be a conflict of interests, but that takes place in any situation where differing functions or objectives are involved. Moreover, the composition of the United Nations is such that there may be a rejection by staff members of the state of their original nationality, such as for example employees who are refugees from certain states that are Members of the international organization. Not very many Member States of the free world would insist upon public evidences of loyalty by such refugees to the states from which they have escaped. The demand for loyalty, therefore, cuts more than one way. At the very best it can mean no more than the integrity and good sense set out in the words quoted above. A host state in particular, and perhaps Member States in general, have a right to expect that their nationals shall not deliberately engage in conspiratorial political action against them. Beyond this a line becomes hard to draw unless there are personal defects, and then the question is no longer one of "loyalty" but one on another level of civil service acceptability.

The strengthening of the Secretary General's position *vis-à-vis* staff through the amendments to the Regulations at the Eighth Session suggest that the United Nations may be moving away from the Continental "vested rights" model toward the Anglo-American civil service theory with its greater emphasis on managerial discretion. Nevertheless, the present forms within which the Secretariat staff member operates and keeps his position remain much more closely related to the European system than to the continued Anglo-American reliance upon technical legal insecurity offset by traditional non-legal safeguards to protect public service employ-

The *Awards Case* provided an opportunity to spell out in greater detail than heretofore the relations of the General Assembly to the Secretariat and to the Administrative Tribunal. It is now clear that the Assembly is not a supreme legislature even with respect to matters confined to it by the Charter; but rather that it is one principal organ of an institution operating within a constitutional framework and it is limited by that framework

[illegible]

5 Finally, it is now evident: if more proof were needed, that international organizations and their staffs need a certain minimum working immunity from local jurisdiction; but that no elaborate claims have been made or need be made for privileges that shelter the staff or the organization from general local law or community relations. It is significant to the debate on the personnel problem has not given rise to any new demand for restating the independence of the Organization or the Secretariat except for the hope expressed by the Secretary General that the Convention Privileges and Immunities should be adopted by all Members not only for purposes of legal convenience, but for its subtle symbolic value.

6. There remains unresolved as yet the question of access to the United Nations Headquarters site by persons coming from abroad to New York for the business of the Organization and who are not members of delegations. There is some indication that progress is being made to improve the situation. Other host states--Switzerland, France, Italy and Canada--have not raised similar difficulties for their guest international organizations. Again the stabilization of Staff Rules and standards will need to be carried further so as to bring some degree of common practice into the procedures followed by the whole family of the United Nations. Recent developments will refer to changes in the staff rules of UNESCO and the needs of personnel there suggest that the problem is by no means solved, nor is it in any way like as serious today in numbers of attending personnel as it was.

Considering the tensions created by the "cold war" and deep distrust of the powers and strategic fears, it is remarkable to think that a universal organization embracing both the East and the West have survived but should be encouraged to continue to develop with considerable vigor. The UN has not solved the problem of a collision between the East and the West. The universal organization assumed what all countries have assumed namely, a search for agreement on the basic rules of conduct which should make necessary a code, politics. The search for agreement have suffered the accidents of an era that is rather peculiar and the rather a dramatic challenge to survive the post war era and the early years of the 21st century.

1. 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683,

THE CHINESE RECOGNITION PROBLEM

By Order of the Court

13. the total of them

On a recent date in January of 1958, President Eisenhower visited the Secretary of Defense, the problem of China's presence in the existence of the Chinese mainland, China, on the mainland, Formosa and the Pescadores, on the other hand, and providing a common basis of agreement for cooperation. From the point of view of international law, this suggestion involves consideration of (1) the legal status of the law of recognition, and the application of that law to the mainland, China, Formosa and the Pescadores, and (2) the legal status of the Apart from considerations of fact and law, consideration of practical national interest and opinion are important. These considerations should be discussed here and presented as they are handled by a policy maker. Fact and law. It is believed that it is clear in the nature of the case to observe international law. Such observation maintains a high regard for which is the major element in changing and maintaining friendly relations and support of the United Nations. Furthermore, international law, accepted by the Family of Nations as a whole, rests upon values which transcend those of the particular case, and upon an experience which transcends that of the particular case. It therefore provides a more useful guide to the foreign policy-maker than national law and opinion.

The foreign policy-maker must be aware of the prevailing national ideology and the national interest, but it is even more important that he have accurate knowledge of the conditions of world and power abroad without which it is impossible for him to appraise the consequences of alternative decisions upon the realization of these interests. Foreign policy differs from domestic policy in that its implementation depends on conditions little subject to the control of national law and thus understood by the national public. Foreign policy must, therefore, often adapt to conditions which public opinion chooses to ignore or of which it is unaware. Domestic policy, on the other hand, can usually control the essential conditions it based upon sufficiently strong public opinion. For this reason, in foreign policy-making, the executive with superior information on world conditions must play a larger role than the legislature primarily influenced by domestic opinions at least until public education in international relations is far more advanced than it is today.

* See Arthur, *et al.*, "United States Foreign Policy," *Foreign Affairs* 300 F. (1935), 33.

11-1-58

1. The first is the fact that the

Government had
the right of
control since 12
years after the
independence
of the country
the government
had the right
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servation by persons of the free and elections controlled by government to control the conduct and free and fair elections. international control, must also be scrutinized, with a particular eye to a particular procedure for determining attitudes and intentions of the people. Publicly expressed opinions or even formally secret ballots may depart very far from indicating attitudes, especially under the disturbed conditions of revolution.

While recognition of a new government of an old state implies that there has been a breach in the constitutional order, it does not imply that there has been a breach in the international order. It is assumed that the new government will observe the obligations of the state under international law, and usually governments seeking recognition loudly assert their intention to do so. Sometimes such governments have set forth interpretations of international law which are debatable, but only rarely have they repudiated international law altogether.

The Soviet Government in its early days characterized international law as a capitalist institution to be superseded by Marxist dialectical materialism, and denied any obligation to pay debts of the Russian Empire or to respect foreign property in Russian territory. These pronouncements were made the basis for non-recognition by the United States, thus asserting that respect for international law is a separate criterion for recognition of a government in the present and probable future. The League of Nations charter sets out as criteria of admission of new members the ability and willingness to observe international obligations. The principle, however, has been to regard the applicant government as a unit in international law, not as a separate criterion, but as evidence of the probable persistence of that government. It is assumed that a government which ignores international obligations is likely to invite reprobation jeopardizing its existence. Thus, if a government is shown to have sufficient firmness to assure its ability to fulfill its obligations, it is usually assumed that its will to do so can be relied upon. The normal sanctions of international law once it functions as a part of the community of nations. It is to be noted that the Soviet Union withdrew its earlier repudiation of international law, even though it continued to interpret its international law as frequently unacceptable to other states.

The same position has generally been taken in regard to governments committed by a government in its rise to power. It is usually accompanied by violence, but assassinations and unusual magnitude have sometimes been made a reason for non-recognition. A tendency has been not to consider such governments as independent criteria for recognition of a government. A government which is brutal in its treatment of its subjects is usually not recognized.

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THE GOVERNMENT OF CHINA

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Members of the United Nations to respect the independence of China, the principles of the United Nations and treaties relating to China. Subsequently the representative of the Nationalist Government introduced a resolution declaring that the Soviet Union had violated its treaties with China and aiding the Chinese Communists, but omitted reference to recognition under the Charter and to non-recognition. This was passed by the General Assembly on February 1, 1952.¹⁸ The General Assembly then went on to assert that the Soviet Union has violated its treaty obligations, and to consider that the Stimson doctrine is not applicable to the Soviet Union in China. (The acquisition of control by the Communist Government was in the opinion a manifestation of the self-determination of the Chinese people rather than a manifestation of aggression by the Soviet Union.) The states which have recognized the Communist Government have acted in accord with this opinion. In fact the China White Paper presented by the Secretary of State to the President of the United States on July 27, 1949, gave strong support to this opinion,¹⁹ as did the Round Table Conference on American Policy toward China, held in the Department of State from October 6 to 8, 1949.²⁰

Even if it were assumed that the alleged Soviet assistance to the Communists was the decisive factor in the success of the latter in China, it is a question of the extent to which the Stimson doctrine would be applicable if the Communist Government is truly established with the consent of the people. That doctrine contains recognition of territorial changes—whether effected by the *de facto* establishment of new states, the *de facto* *chukuo* or by *de facto* annexations as of Manchuria by Italy and of Austria by Germany—when the change has resulted from external aggression without substantial support of the inhabitants of the area. In such cases the state deprived of territory, as China in the "Manchukuo" case, and the states whose security is jeopardized by changes in the balance of power resulting from annexations, should be free to rectify the situation which has been established by illegal action, and consequently the fruits of aggression should not be recognized. The states whose recognition is necessary to validate these changes should withhold recognition.²¹

When, however, a new government is established in an old state, neither of these circumstances exists, even though some outside aid was given to the revolutionists. The change is primarily in the constitutional order of the international order. Recognition requires that states be represented by a government. Consequently international law favors recognition of a

¹⁸ 1952, (1918-1949) 298.

¹⁹ *Ibid.* (1951) 284.

²⁰ United States Relations with China with special reference to the Period 1944-1949 (Department of State, Washington, D.C., August, 1949). Secretary of State Acheson summarized this voluminous material: "The Communist revolution in China was the product of internal forces, forces which this country tried to influence but could not. A Russian was arrived at within China, if only a decision by us not." (p. 10.)

²¹ *Note supra*.

²² Kissinger, *Soviet Memorandum*, note 15 *supra*; Lippman, *Recognition: the if, the when, the how*; *Recognition: A Reconsideration*, 22 *University of Chicago Law Review* 271 (1954).

such a government... even the two general... if the attitude aid is... primary government... was the situation... in China... of the Stimson doctrine... influence of outside... independence of the... of other circumstances.

It is assumed that the Communist government of China... government, the Stimson doctrine would not be applied... given by the Soviet Union... contrary to the... Soviet Government to the National Government of China... resulted in a virtual conquest of China by the Soviet Government... continues in independent state, the Communist government... *de facto* government, would seem entitled to recognition... conclusion seemed to flow from the memorandum... Secretary General of the United Nations on March 8, 1950... suggested that, apart from the virtual recognition... United Nations... pasting upon the credentials of... governments... Member... should be guided only... firm the obligation of membership. The implication was... time only the Communist government could perform... China as a Member.

to the... generally considered a... non-Communist... to the... principles... to recognize... by the British Government... the position taken by... Communist government on January... United States was... same time. Its failure... Communist...

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The action of the Communist government of China in the autumn of 1950, in permitting, and indeed encouraging "volunteers" from China to participate in the North Korean aggression, raised a new issue as to the responsibility and stability of that government, doubtless justifying the delay in further delaying recognition and representation in the United Nations. The conclusion of the armistice on July 27, 1953, again modified the situation. The negotiations which led to the armistice, and the armistice provision calling for a political conference of "both sides" to conclude peace, seemed to recognize first, that the Communist government of China was a belligerent on one side in the hostilities and capable of being a party to an armistice, and second, that the other side in these hostilities construed to mean the Republic of Korea, the United States and the other members of the United Nations engaged in direct hostilities. In fact, the potentially recognized that government as the government of a state capable of entering into a political treaty. (The United States was initially was insistent that the political conference must be regarded as a conference of "both sides" and thus seemed to imply that if the negotiations were successful it would enter into a political treaty with Communist China. Such an act would normally constitute recognition.) The Communist government of China seemed to have assumed that an Geneva Conference which assembled in the Spring of 1954 for such a negotiation constituted recognition in this sense. The United States sought to avoid such an implication by declining either to sign or to endorse the agreement. The United States refused to endorse the Geneva Convention on the basis of not recognizing the Communist government of China. No agreement was reached concerning the Geneva Convention.

the presence of Communist China at the conference
the Communist government added prestige,
the Secretary General of the United Nations
in pursuance of a General Assembly resolution
American and other personnel of the United Nations
by the Peking government.
ment on January 1955, by the
Security Council, remains on the
the Straits of Formosa.

If it were assumed that the Japanese surrender constituted a definitive renunciation of Formosa and the Pescadores and that the Chinese occupation constituted definitive re-annexation of these territories by China, then the Communist government, if recognized as the government of China, would have a legal claim to these islands. Two objections can be made to this conclusion. First, the Japanese surrender was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace. In that treaty, signed in San Francisco, September 8, 1951, after the Communist government was in control of China and without the signature of either of the rival governments of China, Japan did "renounce all rights, titles and claims" to these islands, but the "boundary of this renunciation was not stated."³ It would appear, therefore, that the claims of the *de facto* occupant, the government of Chiang Kai-shek, were recognized in, perhaps subject to ultimate validation by the Allied Powers with whom Japan concluded the treaty. These 48 states included the United States, the United Kingdom and France but not the People's Republic of China. No definitive action by the signatory states was taken, though, in the United States on December 2, 1954, signed a treaty with the "Republic of China" represented by the Nationalist Government, guaranteeing these islands against attack. A non-attacking treaty, however, was the Government of the "Republic of China" had to these three islands from Formosa, the Pescadores or "the other islands" which it controlled.

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tion and *de facto* recognition.) It declared its own independence in 1776 and in 1793 promptly recognized the French Republic. But even then, although the hands of the latter were still fresh from the blood of Louis XVI, whose aid had contributed to realization of that Declaration. On March 12, 1793, Secretary of State Jefferson wrote to Gouverneur Morris, American Minister in Paris:

"We surely cannot deny to any nation that right wherein our own government is founded—that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether King, convention, assembly, committee, president, or anything else is ready choice. The will of the nation is the only thing essential to be regarded."

A month later President Washington submitted to his cabinet the question of receiving Citizen Genet as representative of the new French Republic. Secretaries Hamilton and Knox thought qualifications should be attached to this reception, but Washington received Genet without qualification.⁴¹ In pronouncing the Monroe Doctrine a generation later and in promptly recognizing numerous new states and governments during the next century, the United States expounded a forthright policy of the "legitimacy" or constitutionality of internal changes in international law. Revolution was considered a right whose fruits should be recognized when firmly established according to the "will of the nation."⁴²

It is true that in the twentieth century there were departures from this principle. Practices of non-recognition were pursued in Central America, Mexico and other Latin American countries to discourage revolution and promote stability. The prolonged non-recognition of the Soviet Government and the Communist government of China were said to be justified by the repudiation or neglect of obligations under international law by those governments.⁴³ The non-recognition of Manchukuo, of Mussolini's conquest of Ethiopia, of Hitler's conquest of Austria and of Spain's conquest of the Balearic states was considered a legal obligation flowing from commitments to discourage aggression. (In other cases, premature recognition, as of Cuba (1898), Panama (1903), Czechoslovakia (1918) and Austria (1918), was justified by doubt whether the *de facto* situation was due to the will of the people.) In these cases there was also a desire to intervene to assist the realization of that will. In other cases, during the interwar period *de facto* dictators were recognized without regard to the lack of popular consent.⁴⁴

International law tolerates or even requires consideration of circumstances which provide evidence of the probable durability of a situation established in fact, but it considers the internal ideology, or the policy of a government, irrelevant, only if they cannot be easily ascertained.

⁴¹ Moore, *Digest of International Law*, 1:179.

⁴² *Ibid.* at 121.

⁴³ See Lauterpacht, *Recognition*

93 ff., and *ibid.* 416 ff.

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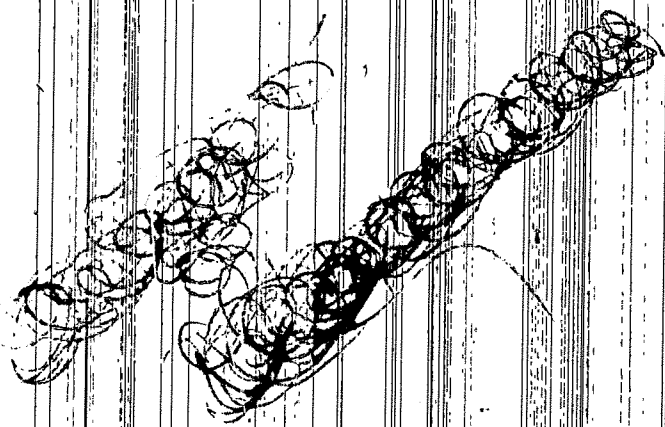
1. The first thing I noticed when I stepped out of the plane was the cold air. It was a sharp contrast to the warm, humid air of the tropics. I shivered slightly, but then I remembered that this was just the beginning of my journey. I took a deep breath and smiled. I was here, in the heart of the wilderness, and I was going to make the most of it. I looked around at the vast, open landscape and felt a sense of freedom. I was alone, but not lonely. I was free, and I was happy. I took another deep breath and walked towards the horizon. The sun was setting, and the sky was a beautiful mix of orange and red. I felt a sense of peace and tranquility. I was in the right place, at the right time. I was exactly where I needed to be.

2. The second thing I noticed was the sound of the wind. It was a low, steady hum that filled the air. It was a sound that I had never heard before. It was a sound that was both soothing and powerful. I closed my eyes and listened to it. It was a sound that was a reminder of the power of nature. It was a sound that was a reminder of the beauty of the world. I opened my eyes and looked at the horizon. The sun was still setting, and the sky was still a beautiful mix of orange and red. I felt a sense of awe and wonder. I was in the presence of something greater than myself. I was in the presence of the divine. I took another deep breath and walked towards the horizon. The sun was still setting, and the sky was still a beautiful mix of orange and red. I felt a sense of peace and tranquility. I was in the right place, at the right time. I was exactly where I needed to be.

3. The third thing I noticed was the smell of the earth. It was a rich, earthy scent that filled the air. It was a scent that I had never smelled before. It was a scent that was both comforting and mysterious. I closed my eyes and inhaled it. It was a scent that was a reminder of the power of the earth. It was a scent that was a reminder of the beauty of the world. I opened my eyes and looked at the horizon. The sun was still setting, and the sky was still a beautiful mix of orange and red. I felt a sense of awe and wonder. I was in the presence of something greater than myself. I was in the presence of the divine. I took another deep breath and walked towards the horizon. The sun was still setting, and the sky was still a beautiful mix of orange and red. I felt a sense of peace and tranquility. I was in the right place, at the right time. I was exactly where I needed to be.

The first thing I noticed when I stepped out of the plane was the cold, crisp air. It was a relief after the stuffy cabin. I looked around and saw a few other passengers, some looking tired and others looking excited. I found my seat and sat down, feeling a bit nervous. The flight attendant came over and asked if I needed anything. I said no, but she smiled and said, "Welcome aboard." The plane took off, and I watched the ground disappear below me. I felt a sense of freedom and adventure. The flight was smooth, and the food was delicious. I was in good luck.

of a claim to the government of China. Political conditions seem to be favorable to the general recognition of the Communist government as the government of China and the assistance of its representatives to the organs of the United Nations. Mutual guarantees of non-aggression between China and Formosa might be achieved provisionally even before these states formally recognize each other. A negotiation dealing with all these aspects of the problem might establish a more tranquil situation in the Far East.)



STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW

By F. V. GARCÍA-AMADOR

Member of the International Law Commission of the United Nations

During its eighth regular session, the General Assembly of the United Nations considered "that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified." To this end, the Assembly requested the International Law Commission to undertake the codification of these principles.¹ The Tenth Inter-American Conference held in Caracas March 1-28, 1954, adopted a similar resolution.² Considering that "The American Continent has made a notable contribution to the development and to the codification of the principles of international law that govern the responsibility of the State," the Conference resolved to entrust the Inter-American Council of Jurists and its Permanent Commission, the Inter-American Juridical Committee of Rio de Janeiro, with the preparation of a study or report on the subject.³

As is true with respect to other topics of international law, the codification of the principles governing state responsibility is not a task that can be confined today to a mere enumeration and systematization of the various legal rules that theory and practice have established on the subject.⁴ It is not difficult to understand why this codification cannot be undertaken as a pure and simple restatement of existing rules. (These rules were created and have developed according to some fundamental views and concepts which have undergone a profound transformation in contemporary international law.) In particular this transformation has affected in a very substantial way the traditional view of international personality.⁵ And it is quite evident that the traditional concept of the subjects of international law has governed the theory and practice of responsibility, especially in matters relating to damage caused to the person or property of aliens. (There are also new concepts regarding the penal responsibility of states and in connection with respect to some international obligations which were unknown in traditional law.) In short, the codification of the principles of international

¹ Resolutions adopted by the General Assembly during its eight to tenth sessions. (United Nations Supp. No. 12 (A/2640), Res. 789 (VIII). The resolution adopted at the beginning of the thirteenth session of the discussion of a Report of the Secretary-General's Commission on the Law of the Sea, A/C.2/L.3/1 and A/C.2/SR.594.

² O.A.U. Third Act of the Tenth Inter-American Conference (Caracas, March 1-28, 1954), 16 A.C.I.J. Supp. 125 (1954). This resolution was also submitted by the United States to the United Nations, which took into account that, according to the particular situation of the Americas and cooperation by the United Nations International Law Commission and the Inter-American Juridical Committee with the development and codification of international law, should be given priority. Dec. 21, 1954.

nationals respect for the rules of international law.”⁷ (In consequence of this principle, stateless persons have been deprived of the protection of the rules of “common international law” of aliens, to use the expression devised by the former Permanent Court; despite the fact that they practically possessed that *status* in municipal law. This principle has also given rise to the problems of double or multi-nationality cases. A corollary of the same principle has been that the nature and amount of the reparation claimed have as a rule been determined by the state, not by the individual or legal person injured.)

There would undoubtedly be serious difficulties if an attempt were made to retain this principle and its corollaries, with all their traditional rigidity, in a codification consistent with certain basic postulates of contemporary international law. The international recognition and protection of human rights are facts whose consequences must inevitably affect the right or capacity to bring international claims. Actually, it is very difficult today to maintain the opinion that the state is responsible only with respect to another state; and that in the cases of responsibility for damages to the person or property of aliens there is not a violation of the right of an individual, but merely of the right of the state to insure that such individual be treated in conformity with international law. But in one way or the other, when internationally recognized human rights are at stake, the only and sole possible holder of such rights is the individual because it is precisely to this aim that recognition is granted. In the other hypothesis—such as those of contractual rights—it is only by virtue of a pure fiction, a fiction devised to protect the political prestige and other interests of the state, that one may deny that the true and only subject of those rights is again the individual.

On the other hand, if a solution of the procedural problem of the claim is really (what was) sought, then what should have been done was to recognize in the interested party, in the form and conditions deemed appropriate, a right or procedural remedy. Practice in this respect has been, in a sense, more far-reaching than theory, as is shown by those cases in which an international procedural capacity was granted to private individuals. Reference is made to the *locus standi* which was granted to individuals before the arbitral tribunals set up under Articles 297 and 304 of the Treaty of Versailles, and more particularly to the much more independent position they enjoyed before the Central American Court of Justice and before the Arbitral Tribunal for Upper Silesia set up under the German-Polish Convention of May 15, 1922. The capacity of international civil servants and other persons in respect of the League of Nations and the United Nations Administrative Tribunals are also precedents which are to some extent related to the specific question under discussion. The capacity of the individual directly to acquire international rights, together with the antecedents just mentioned, shows a definite trend of international law, a trend which cannot be ignored when the principles governing state respon-

⁷ P.C.I.J., Ser. A/B, No. 76 (1939) 16.

budgetary provision therefor and that such awards could not be made by the Assembly.¹²⁷

The French Government statement came to the conclusion that there was no legal basis for the Assembly refusing to pay the awards except upon the unlikely circumstance of financial disability facing the Organization.¹²⁸ This would be a reason of necessity, not a reason of law, and the French Government admitted that it merely raised the question of necessity and that it had no practical meaning for the present case.

Unquestionably the arguments before the Court that were most difficult and had to be met were those put forward by the United States in its insistence on the supreme position of the Assembly, both in creating the Tribunal and in being able to destroy it, as well as the Assembly's position as the final arbiter in the expenditure of funds on behalf of the Organization because of the Assembly's power to approve the budget.

It is interesting that the Court was able to overcome both arguments with a good deal of logic and force. As to the supreme position of the Assembly the Court made it clear that, once the Assembly created an organ, it could not deny the effects which the Statute provided in setting up a United Nations constitutional instrument capable of rendering final and binding judgments. Particularly was this the case when the functions of the organ were to be judicial functions which the Charter did not vest in the Assembly itself. Again, all of the obligations of the Organization had to be honored by the Organization, and while there may have been a strictly political "power" to refuse to vote the budget or an item therein—although the Court does not spell this out—there was no "legal" right to employ the Assembly's functions in relation to the budget to prevent the payment of a due obligation of the Organization as a whole. In essence, the Court was saying that once a judicial body had been created, its functioning and its awards should be treated as binding in the same way as the decisions of courts under national laws may bind all the organs of the state.¹²⁹

VIII. THE NINTH SESSION AND THE SECRETARIAT

The recent session of the Assembly witnessed the climax of these past three years of developments in personnel policies and in the difficulties discussed above. The Secretary General presented to the Fifth Committee an interim personnel report outlining the developments since the Eighth General Assembly and the important changes in the Staff Regulations and Rules.¹³⁰ He presented also his Report on the Organization of the Secretariat describing in detail the reorganization of the various departments of the Secretariat and the appointment of a series of Under Secretaries

¹²⁷ *Ibid.* at 109-110.

¹²⁸ *Ibid.* at 22.

¹²⁹ *Supra* note 123, at 61: "... it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."

¹³⁰ Report of the Secretary General on Personnel Policy of the United Nations, U.N. Doc. A/2777; also Report of the Fifth Committee, U.N. Doc. A/2862.

without departmental responsibilities.¹³⁵ Finally, the Fifth Committee, largely under the leadership of the United States, examined the merits of the International Court's opinion in the *Awards Case* with particular reference to the future status of the Tribunal.¹³⁴ It is not possible to deal in detail with all of these matters. Suffice it to say that the Personnel Report disclosed the fact that the machinery contemplated in administering the extremely delicate grounds for dismissal in Regulation 9.1 (a) had been put into force with the establishment of the Advisory Board, and that during its first session in mid 1954 several cases were considered and reported on by it.¹³⁵ The Secretary General promised that he would provide the Tenth Session with a review of the principles and standards developed in the work of the Board as reported by the Eighth Session in Resolution 782.¹³⁶ Perhaps most interesting was the recent appearance of the Report on Standards of Conduct in International Civil Service prepared by the International Civil Service Advisory Board.¹³⁷ The Secretary General properly stressed the importance of this report and, indeed, in many respects it is a classical statement of standards of behavior for international civil servants. It is significant that the inflammable question of "loyalty" of the international civil servant is approached by the Board's Report in the following language:

... an international outlook . . . flows from understanding of and loyalty to the objective and purposes of the international organization set forth in its Charter or Constitution. The acceptance of the oath of office and of the basic obligation to serve wholeheartedly and completely the organization's interests needs to be worked out in many different situations. It involves willingness to try to understand and be tolerant of different points of view, different cultural patterns, and different work habits. It also entails willingness to work without prejudice and to deal with persons of all nationalities, religions and cultures. It requires a readiness to be continually conscious of how proposals, events and statements of opinion may appear to a very wide range of nationalities. . . . In fact, the highest type of loyal international civil servant is one who finds that whatever his personal views he can willingly subordinate them to the observance of his international obligations and support the decisions of the international organization he serves. . . . What is essential is not the absence of personal political or national views but their restraint at all times . . . in the expression of such views.¹³⁸

At the Fifth Committee the United States, supported at first by Argentina and later by Canada, Chile and Turkey,¹³⁹ presented a draft resolution on the Organization of the Secretariat, Report of the Secretary General, U.N. Doc.

... of the Fifth Committee *r.* Awards of Compensation Made by the United States Tribunal; Advisory Opinion of the International Court of Justice, U.N. Doc.

¹³⁴ *supra* note 132, at 7.

¹³⁵ *supra* note 113.

¹³⁶ *supra* at 4.

¹³⁷ U.N. Doc. COORD/CIVIL SERVICE.

¹³⁸ Resolution of Argentina and U. S. A., U.N. Doc. A/C. 5/L. 317, as amended

by U. S. A., A/C. 5/L. 321, and U.N. Doc. A/C. 5/L. 321, Rev. 1; also Belgian draft,

A/C. 5/L. 322.

tion, which sought to solve the awards question once and for all by a promise, which the United States accepted, namely, an authorization to pay the present awards from a newly-established revolving fund, but declined on principle to accept the theory of a permanent or *ad hoc* fund, and to provide for appeal from or "review of" the Administrative Tribunal's decisions. In the Fifth Committee there seemed to be much confusion of thought and considerable dispute as to the value of these proposals. In the end an inconclusive vote in the Committee led to a resolution rejecting the principle of appeal and establishing only a special committee to study the problem, in addition to now authorizing payments.¹⁴⁰ But when the matter went to the Plenary Session of the Assembly, the principle "of review"—not appeal—was reasserted with success and a special committee was established to examine the problem in 1955, and to report back to the Assembly at the Tenth Session.¹⁴¹

In the debates in the Plenary Session it must be confessed that Senator Fulbright's arguments as to the desirability for a review on principle were not very convincing. He insisted that judicial review procedure would strengthen the relations between the Secretary General and the staff, declaring that

on his side the Secretary-General will have an assurance that the decisions he makes as the chief administrative officer of the Organization will receive the fullest judicial consideration and that his authority laid down in the Charter and the Staff Regulations will be given full legal respect. On their side the staff will have greater assurance that their legal rights and privileges will be observed.¹⁴²

Perhaps one of the strongest arguments against the United States' position was made by Mr. Sapru of India.¹⁴³ He pointed out that Senator Fulbright in the Fifth Committee and elsewhere may have misread the Court's judgment when he believed the Court recommended the establishment of a judicial review procedure, and in this criticism he seems quite justified.

It now remains for the seventeen named member countries¹⁴⁴ to meet at a time to be fixed in consultation with the Secretary General and to report back to the Fifth Committee at the Tenth Session.

IX. CONCLUSIONS

Since it is now possible to view this long and complex development in some perspective, the following observations seem relevant:

1. The international civil service represented particularly by the United Nations Secretariat has undergone quite severe psychological and administrative distress as a result of allegations concerning its integrity; of claims of espionage and the over-dramatized significance of cases of personnel who refused to testify before United States Senate committees or Federal Grand Juries; of the lack of a clearly defined policy by the Or-

¹⁴⁰ Cited *supra* note 132, at 16-18.

¹⁴¹ U.N. Doc. A/L. 192.

¹⁴² Provisional Record, U. N. Doc. A/P.V. 515, at p. 18.

¹⁴³ *Ibid.* at 21-22.

¹⁴⁴ *Ibid.* at 46.

in dealing with the pressures brought to bear upon it by the instability and death of the Organization and feeding out processes which have been taking place during the past two or three years, first under the Legal Committee and recently in the reorganization sponsored by the present Secretary General. Nevertheless, out of all of this strain has come one good thing. It at least has led Member States to define for themselves the institutional position of the Organization, the Secretariat, and the General Assembly in dealing with staff matters as well as host and Member State relations. And that clarification should lead to greater stability internally and in relations of the Organization to all states.

Greater clarification has come also to the question of the so-called conflicting loyalties affecting the international staff member. There are really of varieties of loyalties and it is a misuse of the term to confine its application to national political allegiance alone. There is no necessary conflict in loyalties between the civil servant's international responsibilities and his proper national obligations. There may well be a conflict of interests, but that takes place in any situation where differing functions or objectives are involved. Moreover, the composition of the United Nations is such that there may be a rejection by staff members of the state of their national nationality, such as for example employees who are refugees from certain states that are Members of the international organization. Not very many Member States of the free world would insist upon public evidences of loyalty by such refugees to the states from which they have escaped. The demand for loyalty, therefore, cuts more than one way. At the very least it can mean no more than the integrity and good sense set out in the motto quoted above. A host state in particular, and perhaps Member States in general, have a right to expect that their nationals shall not deliberately engage in conspiratorial political action against them. Beyond that line becomes hard to draw unless there are personal defects, and the question is no longer one of "loyalty," but one of another level of civil service acceptability.

The strengthening of the Secretary General's position *vis-à-vis* staff through the amendments to the Regulations at the Eighty Session suggests that the United Nations may be moving away from the Continental "vested interest" model toward the Anglo-American civil service theory with its greater emphasis on managerial discretion. Nevertheless the present status within which the Secretariat staff member operates and keeps his status remain much more closely related to the European system than to the continued Anglo-American reliance upon technical legal insecurity offset by traditional non-legal safeguards to protect public service employ-

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Finally, if more proof were needed, the fact that the Organization has not given rise to any new demand for a statute of the Organization or the Secretariat is itself the best proof of the hope expressed by the Secretary General that the Convention on Privileges and Immunities should be adopted by all Members not only for purposes of legal convenience, but for its subtle symbolic value.

There remains unresolved the question of access to the United Nations Headquarters site for persons coming from abroad to New York for the business of the Organization and who are not members of delegations. There is some indication that progress is being made to improve the situation. Other host states—Switzerland, France, Italy and Canada—have not raised similar difficulties for their guest international organizations. Again the stabilization of staff Rules and standards will need to be carried further so as to bring some degree of common practice into the procedures followed by the whole family of the United Nations. Recent developments with respect to changes in the staff rules of UNESCO¹⁴⁵ and dismissals of personnel there suggest that the problem is by no means an old, although it is not anything like as serious today in numbers or intensity as once it was.

Considering the tension created by the "cold war" and depth of the political passions and strategic fears, it is remarkable to think that an international, indeed almost universal, organization embracing both "East" and "West," should not only have survived but should be carrying on its political and welfare activities with considerable vigor. The United Nations was never destined to solve the problem of collision between great Powers. Its constitution assumed what all constitutional systems assume, namely, a large measure of agreement on the basic rules of the game which alone can make successful a body politic. The servants of that institution have suffered the vicissitudes of an era that is neither peace nor war but rather a continuing challenge to survive the political and military temptations of the atomic age.

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recognition. It is true that the United States had previously recognized the National Convention Government in the hands of the latter were still fresh in the minds of those who had contributed to its realization. In 1793, Secretary of State Jefferson was the American Minister in Paris.

We surely cannot deny to any nation that right where a new government is founded—that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded."

Four months later President Washington submitted to his cabinet the question of receiving Citizen Genet as representative of the new French Republic. Secretaries Hamilton and Knox thought qualifications should be a factor in this reception, but Washington received Genet without qualification. In pronouncing the Monroe Doctrine a generation later and in promptly recognizing numerous new states and governments during the next century, the United States combatted efforts to import concepts of the illegitimacy or constitutionality of internal changes into international law. Recognition was considered a right whose fruits should be recognized when established according to the "will of the nation."

It is true that in the twentieth century there were departures from this policy. Practices of non-recognition were pursued in Central America, the Caribbean and other Latin American countries to discourage revolution and instability. The prolonged non-recognition of the Soviet Government and the Communist government of China were also justified by the failure or neglect of obligations under international law by those governments. The non-recognition of Manchukuo, of Mussolini's conquest of Ethiopia, of Hitler's conquest of Austria, and of Japan's conquest of Manchuria was considered a legal obligation arising from commitment to the League of Nations. In other cases, such as the recognition of the Soviet Union in 1933, Czechoslovakia in 1939, and Poland in 1945, the question was whether the facts of the case corresponded to the legal principle. In these cases there was no disposition to recognize the government of the country. In other cases during the twentieth century, non-recognition was not considered

an exercise of discretion. The recognition of circumstances of emergency, such as the duty of a government to maintain order, to protect the economy and to maintain only such international capacity to meet

...mandatory, are of doubtful constitutionality and are policies grounded on international law and contraindicated by security and international tranquility.

CONCLUSION

It is assumed as the available evidence suggests, that the Communist and Nationalist governments are, respectively, established in the mainland China and the other in Formosa and the Pescadores. Their administrative efficiency, public support, and respect for international obligations make it unlikely that they will be overthrown by internal rebellion or external invasion in any foreseeable future. The following propositions appear to be legal consequences:)

The United States is free to recognize the Communist government as the government of China and to do so would be in accord with its traditional policy and the normal expectations of international law.

The United States is free to recognize Formosa and the Pescadores as an independent state under the Nationalist Government, and to do so would be in accord with traditional practice and the principles of the United Nations Charter, provided free and fair elections indicate that an independent state exists under the Nationalist Government conforms to the wishes of the inhabitants.

While the United States may not be under a positive obligation to recognize the Communist government as the government of China, it appears to be the general *de facto* government of China, and it is alone capable of committing offenses under international law and of representing China in international transactions. It appears that the United States should not continue to recognize the Nationalist Government as the government of China by the Nationalist Government or the Communist Government as the government of China.

The United States appears to have no obligation to recognize the government of Formosa and the Pescadores as an independent state, and it is not under any obligation to guarantee its independence.

The United States appears to have no obligation to recognize the Communist Government as the government of China, and it is not under any obligation to guarantee its independence. The United States appears to have no obligation to recognize the Nationalist Government as the government of China, and it is not under any obligation to guarantee its independence.


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The government of China has invited the representatives to
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the situation is completely stabilized. The negotiation dealing with all
aspects of the problem will lead to a more tranquil situation in
Far East.

STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW

By F. V. GAROL-ACIADOR

Member of the International Law Commission of the United Nations

(During its eighth regular session, the General Assembly of the United Nations considered "that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified." To this end, the Assembly requested the International Law Commission to undertake the codification of these principles.¹ The Tenth Inter-American Conference, held in Caracas March 1-28, 1954, adopted a similar resolution.) Considering that "The American Continent has made a notable contribution to the development and to the codification of the principles of international law that govern the responsibility of the State," the Conference resolved to entrust the Inter-American Council of Jurists and its Permanent Commission, the Inter-American Juridical Committee of Rio de Janeiro, with the preparation of a study or report on the subject.²

As is true with respect to other topics of international law, (the codification of the principles governing state responsibility is not a task that can be confined today to a mere enumeration and systematization of the various legal rules that theory and practice have established on the subject) it is not difficult to understand why this codification cannot be undertaken as a pure and simple restatement of existing rules. (These rules were created and have developed according to some fundamental views and concepts which have undergone a profound transformation in contemporary international law.) In particular this transformation has affected in a very substantial way the traditional view of international personality. And it is quite evident that the traditional concept of the subjects of international law has governed the theory and practice of responsibility, especially as it refers to damages caused to the person or property of aliens. (There are also new concepts regarding the penal responsibility of states and in general with respect to some international obligations which were unknown to traditional law.) In short, the codification of the principles of international

¹ Resolutions adopted by the General Assembly during its Eighth Session: Official Documents, Supp. No. 17 (A/2630), Res. 799 (VIII). The resolution was submitted by the Delegation of Cuba in the course of the discussion of a Report of the International Law Commission (cf. Docs. A/C. 6/L. 311 and A/C. 6/SR. 394).

² Res. CIV, Final Act of the Tenth Inter-American Conference (Caracas, March, 1954); 48 A.J.I.L. Supp. 128 (1954). This resolution was also submitted by the Delegation of Cuba, which took into account that, according to the pertinent instruments, the relations and co-operation between the International Law Commission and the inter-American bodies entrusted with the development and codification of international law should be promoted (cf. Doc. 247, SG-151).

nationals respect for the rules of international law."⁷ (In consequence of this principle, stateless persons have been deprived of the protection of the rules of "common international law" of aliens, to use the expression devised by the former Permanent Court; despite the fact that they practically possessed that *status* in municipal law. This principle has also given rise to the problems of double or multi-nationality cases. A corollary of the same principle has been that the nature and amount of the reparation claimed have as a rule been determined by the state, not by the individual or legal person injured.)

There would undoubtedly be serious difficulties if an attempt were made to retain this principle and its corollaries, with all their traditional rigidity, in a codification consistent with certain basic postulates of contemporary international law. The international recognition and protection of human rights are facts whose consequences must inevitably affect the right or capacity to bring international claims. Actually, it is very difficult today to maintain the opinion that the state is responsible only with respect to another state; and that in the cases of responsibility for damages to the person or property of aliens there is not a violation of the right of an individual, but merely of the right of the state to insure that such individual be treated in conformity with international law. But in one way or the other, when internationally recognized human rights are at stake, the only and sole possible holder of such rights is the individual because it is precisely to this aim that recognition is granted. In the other hypothesis—such as those of contractual rights—it is only by virtue of a pure fiction, a fiction devised to protect the political prestige and other interests of the state, that one may deny that the true and only subject of those rights is again the individual.

On the other hand, if a solution of the procedural problem of the claim is really (what was) sought, then what should have been done was to recognize in the interested party, in the form and conditions deemed appropriate, a right or procedural remedy. Practice in this respect has been, in a sense, more far-reaching than theory, as is shown by those cases in which an international procedural capacity was granted to private individuals. Reference is made to the *locus standi* which was granted to individuals before the arbitral tribunals set up under Articles 297 and 304 of the Treaty of Versailles, and more particularly to the much more independent position they enjoyed before the Central American Court of Justice and before the Arbitral Tribunal for Upper Silesia set up under the German-Polish Convention of May 15, 1922. The capacity of international civil servants and other persons in respect of the League of Nations and the United Nations Administrative Tribunals are also precedents which are to some extent related to the specific question under discussion. The capacity of the individual directly to acquire international rights, together with the antecedents just mentioned, shows a definite trend of international law, a trend which cannot be ignored when the principles governing state respon-

⁷ P.C.I.J., Ser. A/B, No. 76 (1939) 16.

budgetary provision therefor and that such awards could not be contested by the Assembly.¹²⁹

The French Government statement came to the conclusion that there was no legal basis for the Assembly refusing to pay the awards except perhaps in the unlikely circumstance of financial disability facing the Organization.¹³⁰ This would be a reason of necessity, not a reason of law, and the French Government admitted that it merely raised the question theoretically and that it had no practical meaning for the present case.

Undoubtedly the arguments before the Court that were most difficult and had to be met were those put forward by the United States in its insistence on the supreme position of the Assembly, both in creating the Tribunal and in being able to destroy it, as well as the Assembly's position as the final arbiter in the expenditure of funds on behalf of the Organization because of the Assembly's power to approve the budget.

It is interesting that the Court was able to overcome both arguments with a good deal of logic and force. As to the supreme position of the Assembly the Court made it clear that, once the Assembly created an organ, it could not deny the effects which the Statute provided in setting up a United Nations constitutional instrument capable of rendering final and binding judgments. Particularly was this the case when the functions of the organ were to be judicial, functions which the Charter did not vest in the Assembly itself. Again, all of the obligations of the Organization had to be honored by the Organization, and while there may have been a strictly political "power" to refuse to vote the budget or an item therein—although the Court does not spell this out—there was no "legal" right to employ the Assembly's functions in relation to the budget to prevent the payment of a due obligation of the Organization as a whole. In essence, the Court was saying that once a judicial body had been created, its functioning and its awards should be treated as binding in the same way as the decisions of courts under national laws may bind all the organs of the state.¹³¹

VIII. THE NINTH SESSION AND THE SECRETARIAT

The recent session of the Assembly witnessed the climax of these past three years of developments in personnel policies and in the difficulties discussed above. The Secretary General presented to the Fifth Committee an interim personnel report outlining the developments since the Eighth General Assembly and the important changes in the Staff Regulations and Rules.¹³² He presented also his Report on the Organization of the Secretariat describing in detail the reorganization of the various departments of the Secretariat and the appointment of a series of Under Secretaries

¹²⁹ *Ibid.* at 109-110.

¹³⁰ *Ibid.* at 22.

¹³¹ *Supra* note 123, at 61: "... it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."

¹³² Report of the Secretary General on Personnel Policy of the United Nations, U.N. Doc. A/2777; also Report of the Fifth Committee, U.N. Doc. A/2862.

without departmental responsibilities.¹³³ Finally, the Fifth Session, largely under the leadership of the United States, examined the substance of the International Court's opinion in the *Awards Case* with particular reference to the future status of the Tribunal.¹³⁴

It is not possible to deal in detail with all of these matters. Suffice it to say that the Personnel Report disclosed the fact that the machinery contemplated in administering the extremely delicate grounds for dismissal under Regulation 9.1 (a) had been put into force with the establishment of a Special Advisory Board, and that during its first session in mid-1954 two cases were considered and reported on by it.¹³⁵ The Secretary General promised that he would provide the Tenth Session with a review of the principles and standards developed in the work of the Board as required by the Eighth Session in Resolution 782.¹³⁶ Perhaps most interesting of all was the recent appearance of the Report on Standards of Conduct in International Civil Service prepared by the International Civil Service Advisory Board.¹³⁷ The Secretary General properly stressed the importance of this report and, indeed, in many respects it is a classical statement as to standards of behavior for international civil servants. It is significant that the inflammable question of "loyalty" of the international public servant is approached by the Board's Report in the following language:

... an international outlook . . . flows from understanding of and loyalty to the objective and purposes of the international organization as set forth in its Charter or Constitution. The acceptance of the oath of office and of the basic obligation to serve wholeheartedly and completely the organization's interests needs to be worked out in many directions. It involves willingness to try to understand and be tolerant of different points of view, different cultural patterns, and different work habits. It also entails willingness to work without prejudice or bias with persons of all nationalities, religions and cultures. It requires a readiness to be continually conscious of how proposals, events and statements of opinion may appear to a very wide range of nationalities . . . In fact, the highest type of loyal international civil servant is one who finds that whatever his personal views he can willingly conform to the observance of his international obligations and support the decisions of the international organization he serves. . . . What is essential is not the absence of personal political or national views but rather restraint at all times . . . in the expression of such views.¹³⁸

At the Fifth Committee the United States, supported at first by Argentina and later by Canada, Chile and Turkey,¹³⁹ presented a draft resolution

Organization of the Secretariat, Report of the Secretary General, U.N. Doc.

Report of the Fifth Committee re: Awards of Compensation Made by the United Nations Tribunal; Advisory Opinion of the International Court of Justice, U.N. Doc.

133 *Id.* op. cit. supra note 132, at 7.

134 *Id.* note 113.

135 U.N. Doc. COORD/CIVIL SERVICE.

136 *Id.* at 4.

137 Resolution of Argentina and U. S. A., U.N. Doc. A/C. 5/L. 317, as amended by U.N. Doc. A/C. 5/L. 321, and U.N. Doc. A/C. 5/L. 321, Rev. 1; also Belgian draft,

tion which sought to solve the awards question once and for all by a compromise, which the United States accepted, namely, an authorization to pay the present awards from a newly-established revolving fund, but a decision on principle to accept the theory of a permanent or *ad hoc* judicial body to provide for appeal from or "review of" the Administrative Tribunal's decisions. In the Fifth Committee there seemed to be much confusion of thought and considerable dispute as to the value of these proposals. In the end an inconclusive vote in the Committee led to a resolution rejecting the principle of appeal and establishing only a special committee to study the problem, in addition to now authorizing payments.¹⁴⁰ But when the matter went to the Plenary Session of the Assembly, the principle "of review"—not appeal—was reasserted with success and a special committee was established to examine the problem in 1955, and to report back to the Assembly at the Tenth Session.¹⁴¹

In the debates in the Plenary Session it must be confessed that Senator Fulbright's arguments as to the desirability for a review on principle were not very convincing. He insisted that judicial review procedure would strengthen the relations between the Secretary General and the staff, declaring that

on his side the Secretary-General will have an assurance that the decisions he makes as the chief administrative officer of the Organization will receive the fullest judicial consideration and that his authority laid down in the Charter and the Staff Regulations will be given full legal respect. On their side the staff will have greater assurance that their legal rights and privileges will be observed.¹⁴²

Perhaps one of the strongest arguments against the United States' position was made by Mr. Sapru of India.¹⁴³ He pointed out that Senator Fulbright in the Fifth Committee and elsewhere may have misread the Court's judgment when he believed the Court recommended the establishment of a judicial review procedure, and in this criticism he seems quite justified.

It now remains for the seventeen named member countries¹⁴⁴ to meet at a time to be fixed in consultation with the Secretary General and to report back to the Fifth Committee at the Tenth Session.

IX. CONCLUSIONS

Since it is now possible to view this long and complex development in some perspective, the following observations seem relevant:

1. The international civil service represented particularly by the United Nations Secretariat has undergone quite severe psychological and administrative distress as a result of allegations concerning its integrity; of claims of espionage and the over-dramatized significance of cases of personnel who refused to testify before United States Senate committees or Federal Grand Juries; of the lack of a clearly defined policy by the Or-

¹⁴⁰ Cited *supra* note 132, at 15-18.

¹⁴¹ U.N. Doc. A/L. 192.

¹⁴² Provisional Record, U.N. Doc. A/P.V. 513, at 6, 23.

¹⁴³ *Ibid.* at 20.

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ization in dealing with the pressures brought to bear upon it by the country; and finally, of the reorganization and weeding-out processes which have been taking place during the past two or three years first under the Walters Committee and recently in the reorganization sponsored by the present Secretary General. Nevertheless, out of all of this strain has come the good. It at least has led Member States to define for themselves the constitutional position of the Organization, the Secretariat, and the General Assembly in dealing with staff matters as well as host and Member State relations. And that clarification should lead to greater stability internally as well as in relations of the Organization to all states.

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as these limits are spelled out from time to time by judgments of the International Court of Law, constitutional conventions slowly developing in the various organs of the Organization itself. The role of the Tribunal essentially will be to maintain a balance between the staff and the Secretary General, and its "intrusions" are likely to be in direct ratio to the sense of equity and security experienced in the staff by the Secretary General's employment policies and interpretations of his authority.

5. Finally, it is now evident, if more proof were needed, that international organizations and their staffs need a certain minimum working immunity from local jurisdiction, but that no elaborate claims have been made or need be made for privileges that shelter the staff or the organization from general local law or community relations. It is significant that the debate on the personnel problem has not given rise to any new demand for restating the independence of the Organization or the Secretariat except for the hope expressed by the Secretary General that the Convention on Privileges and Immunities should be adopted by all Members not only for purposes of legal convenience, but for its subtle symbolic value.

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Considering the tensions created by the "cold war" and depth of the political passions and strategic fears, it is remarkable to think that an international understanding, almost a universal organization, embracing both East and West, should have survived but should be carrying on with considerable vigor. The United Nations has solved the problem of a collision between East and West. It has assumed what all constitutional democracies have agreed on: the basic lines of a body politic. The survival of the United Nations is neither peace nor war. It is the political and moral

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Dr. Quackenbush

Q. How long did you stay in the hospital?

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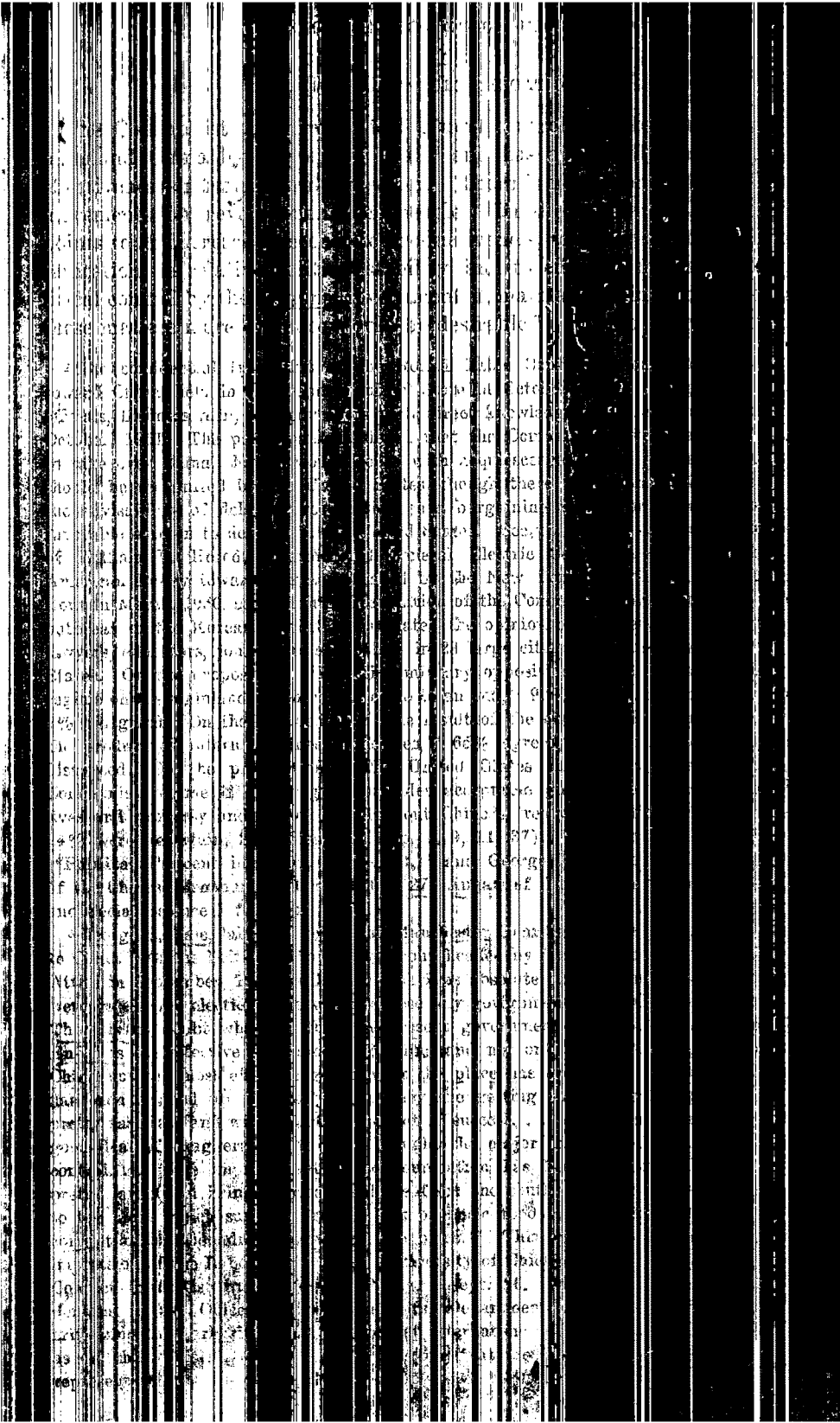
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1. The first group of respondents (Group 1) consisted of 100 individuals who were randomly selected from a list of all individuals who had been employed by the company in the past 12 months. This group was surveyed by mail.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466
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1948-1949

State Department
Directorate of Intelligence

Internal Security - Communist

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Reference: [REDACTED]

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If the Communist government of China can, in fact, prove its ability to govern China without serious domestic and foreign difficulties, she should be admitted to the United Nations. However, the Chinese claim to have become the government of a country cannot be given recognition until it has been tested over a reasonable period of time.

30 *ibid.* 5 (March, 1955). The resolution introduced by New Zealand was almost unanimously approved except for the negative vote of China and the abstention of the Soviet Union.

2. Following this refusal, the Soviet Union proposed exclusion of the "Chinese representative" of China, but the Council approved unanimously, with the exception of the Soviet Union, a United States resolution not to consider a change of Chinese representation at this time. The British representative, supported by the Chinese representative, said the question of China's representation in the United Nations should be left to settle before peaceful and friendly relations could be established between the various governments with interests in the Far East, but admission of the question in the United Nations would do "more harm than good" while the great powers were obviously so deeply divided on this issue. His support of the United States resolution did not mean that the question should never be considered, but that the existing circumstances were not propitious." (Ibid. 6).

War or Peace (New York, Macmillan, 1950) 190. In January 1950, the Secretary General of the United Nations, Dag Hammarskjöld, stated that the United Nations Charter was "the only instrument which has been adopted by the peoples of the world which expresses the aspirations and hopes of the Chinese people." (United Nations, Yearbook of the International Law Commission, Vol. 1, at 20). After detailed study of the question of the representation of China in the United Nations, Herbert W. Briggs concluded in May, 1952: "Why should we not accept the United Nations as it is, and recognize that, within the long and painful process of the United Nations for the interests of a member containing a large and growing population, can be served by disregarding the formal rights of the government in effective control of China in the United Nations?" (United Nations, Yearbook of the International Law Commission, Vol. 1, at 20).

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1793, Secretary of State Jefferson wrote to Gouverneur Morris,
Minister in Paris:

"I cannot deny to any nation that right whereon our own
Government is founded, that they may govern itself according to
the form it pleases, and change its form at its own will; and
that it may transact its business with foreign nations through what
it thinks proper, whether King, convention, assembly, com-
mittee, president, or anything else it may choose. The will of the
people is the only thing essential to be regarded."

At a later President Washington submitted to him, as the question
of receiving Citizen Genet as representative of the new French Republic.
John Jay and Hamilton and others thought qualifications should be attached
to his reception, but Washington received Genet without qualification.⁴¹
The Monroe Doctrine a generation later, and in promptly
numerous new states and governments during the next cen-
tury. United States combated efforts to import concerns of the "le-
gitimacy" or constitutionality of internal changes into international law.
The United States was considered a right whose interests should be recognized when
they established according to the will of the nation.

In the twentieth century there were instances from this
practice of non-recognition were pursued in Central America,
and some Latin American countries to discourage revolution and
instability. The refusal to recognize the Soviet Govern-
ment and the Communist government of China were said to be justified by
the lack of respect for obligations under international law by those
governments. Non-recognition of the Kuomintang government's conquest
of China, the conquest of Angola and the conquest of
the Soviet Union was based on a legal objection to their claim to comit-
ment. In 1900, the United States refused to recognize the
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THE CHINESE RECOGNITION PROBLEM

international responsibilities. To refuse recognition solely on the basis of a government's internal practices is to intervene in its domestic jurisdiction. As President Eisenhower said on April 16, 1953:

Any nation's right to a form of government and an economic system of its own choosing is *inalienable*. Any nation's attempt to deny to other nations their form of government is *indefensible*.⁴³

The United States has in the main adhered to this position established in Washington and Jefferson. Thus Secretary of State Fish said in 1877:

The origin and organization of government are questions generally for internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself and to discharge its internal duties and its external obligations.⁴⁵

This position closely accords with the position of contemporary international law on the subject as stated by a leading international lawyer and judge of the International Court of Justice:

Whenever the requisite conditions of governmental capacity exist, recognition is due as a matter of right. Once the revolutionary government may fairly be held to enjoy, with a reasonable prospect of permanency, the obedience of the mass of the population, and once it is in effective control of the bulk of the national territory, it is entitled to recognition. Its revolutionary origin or the methods of its revolutionary change is irrelevant.⁴⁶

These principles have been developed in the United States by executive practice and pronouncement. Presidential competence in the field of recognition has been established by both practice and judicial interpretation of the Constitution. In recognizing new governments and independent states Congress has not been consulted by the President, though in the recognition of new states such consultation has sometimes been requested. The practice has tended to minimize the influence of national passions and to maximize the influence of international law and the principles of the Constitution. The Congressional resolution of June, 1950, opposing the representation of Communist China in the United Nations, and the Congressional resolution of January 29, 1955, implying that the Republic of China may be associated with Formosa in measures of defense, have not

⁴³ C. Wright, *The Control of American Foreign Relations* (New York: Macmillan, 1952), 15-20.

⁴⁴ 22 Dept. of State Bulletin 589 (1953).

⁴⁵ Moore, *Digest* 2194.

⁴⁶ Lauterpacht, *Letter to the London Times*, Jan. 6, 1950, note 3, and Moore, *op. cit.* at 213; Wright, *Control of American Foreign Relations*, 16-17.

⁴⁷ Including the strategic importance of Formosa and the danger to the Republic of China from the use of Formosa as a base for the attack on the mainland. The President has also taken steps to protect the Republic of China from the use of Formosa as a base for the attack on the mainland. The President has also taken steps to protect the Republic of China from the use of Formosa as a base for the attack on the mainland.

...territories, are of doubtful constitutional status. It is likely that the Nationalist Government will be able to establish its authority over these territories grounded on international law and contribute to national unity and international tranquility.

CONCLUSION

As the available evidence suggests, the Communist and Nationalist governments are, respectively, established in China and the other in Formosa and the Pescadores with sufficient administrative efficiency, public support, and respect for international obligations to make it unlikely that they will be overthrown from within or by rebellion or external invasion in any foreseeable future. The following propositions appear to be legal consequences:

The United States is free to recognize the Communist Government as the Government of China and to do so would be in accordance with its tradition and the normal expectations of international law.

The United States is free to recognize Formosa and the Pescadores as a separate state under the Nationalist Government, and to do so would be in accordance with traditional practice and the principles of the United Nations. Provided free and fair elections indicate that an independent state exists under the Nationalist Government, conforming to the wishes of the people.

The United States may not be under a positive obligation to recognize the Communist government as the government of China, that it appears to be the general duty of governments to recognize the government of China, and to be capable of representing China in international law and to represent China in international relations. It would, therefore, be a mistake to assume that the United States has a duty to recognize the Communist government as the government of China, and the Nationalist Government as the government of Formosa and the Pescadores.

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...of the government of China. Political conditions seem
favorable to the general recognition of the Communist government
the government of China and the admittance of its representatives to
organs of the United Nations. Mutual guarantees of non-aggression
between China and Formosa might be achieved provisionally even before
the states formally recognize each other. A negotiation dealing with all
aspects of the problem might establish a more tranquil situation in
the Far East.



STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW

BY F. V. GARCÍA-AMADOR

Member of the International Law Commission of the United Nations

During its eighth regular session, the General Assembly of the United Nations considered "that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified." To this end, the Assembly requested the International Law Commission to undertake the codification of these principles.¹ The Tenth Inter-American Conference held in Caracas March 1-23, 1954, adopted a similar resolution.² Considering that "The American Continent has made a notable contribution to the development and to the codification of the principles of international law that govern the responsibility of the State," the Conference resolved to entrust the Inter-American Council of Jurists and its Permanent Commission, the Inter-American Juridical Committee of Rio de Janeiro, with the preparation of a study or report on the subject.³

As is true with respect to other topics of international law, (the codification of the principles governing state responsibility is not a task that can be confined today to a mere enumeration and systematization of the various legal rules that theory and practice have established on the subject.) It is not difficult to understand why this codification cannot be undertaken as a pure and simple restatement of existing rules. (These rules were created and have developed according to some fundamental views and concepts which have undergone a profound transformation in contemporary international law.) In particular this transformation has affected in a very substantial way the traditional view of international personality. And it is quite evident that the traditional concept of the subjects of international law has governed the theory and practice of responsibility, especially as it refers to damages caused to the person or property of aliens. (There are also new concepts regarding the penal responsibility of states and in general with respect to some international obligations which were unknown to traditional law.) In short, the codification of the principles of international

¹ Resolutions adopted by the General Assembly during its Eighth Session. Official Documents, Supp. No. 17, (A/2630), Res. 799(VIII). The resolution was submitted by the Delegation of Cuba in the course of the discussion of a Report of the International Law Commission (cf. Docs. A/C. 6/L. 3311 and A/C. 6/SR. 394).

² Res. CIV, Final Act of the Tenth Inter-American Conference (Caracas, March 1954); 48 A.J.I.L. Supp. 128 (1954). This resolution was also submitted by the Delegation of Cuba, which took into account that, according to the report of the Secretary of the relations and cooperation between the International Law Commission and the Inter-American bodies, "the development of a code of international law should be promoted." (Doc. A/2630, 1954).

nationals respect for the rules of international law.”⁷ (In consequence of this principle, stateless persons have been deprived of the protection of the rules of “common international law” of aliens, to use the expression devised by the former Permanent Court; despite the fact that they practically possessed that *status* in municipal law. This principle has also given rise to the problems of double or multi-nationality cases. A corollary of the same principle has been that the nature and amount of the reparation claimed have as a rule been determined by the state, not by the individual or legal person injured.)

There would undoubtedly be serious difficulties if an attempt were made to retain this principle and its corollaries, with all their traditional rigidity, in a codification consistent with certain basic postulates of contemporary international law. The international recognition and protection of human rights are facts whose consequences must inevitably affect the right or capacity to bring international claims. Actually, it is very difficult today to maintain the opinion that the state is responsible only with respect to another state; and that in the cases of responsibility for damages to the person or property of aliens there is not a violation of the right of an individual, but merely of the right of the state to insure that such individual be treated in conformity with international law. But in one way or the other, when internationally recognized human rights are at stake, the only and sole possible holder of such rights is the individual because it is precisely to this aim that recognition is granted. In the other hypothesis—such as those of contractual rights—it is only by virtue of a pure fiction, a fiction devised to protect the political prestige and other interests of the state, that one may deny that the true and only subject of those rights is again the individual.

On the other hand, if a solution of the procedural problem of the claim is really (what was) sought, then what should have been done was to recognize in the interested party, in the form and conditions deemed appropriate, a right or procedural remedy. Practice in this respect has been, in a sense, more far-reaching than theory, as is shown by those cases in which an international procedural capacity was granted to private individuals. Reference is made to the *locus standi* which was granted to individuals before the arbitral tribunals set up under Articles 297 and 304 of the Treaty of Versailles, and more particularly to the much more independent position they enjoyed before the Central American Court of Justice and before the Arbitral Tribunal for Upper Silesia set up under the German-Polish Convention of May 15, 1922. The capacity of international civil servants and other persons in respect of the League of Nations and the United Nations Administrative Tribunals are also precedents which are to some extent related to the specific question under discussion. The capacity of the individual directly to acquire international rights, together with the antecedents just mentioned, shows a definite trend of international law, a trend which cannot be ignored when the principles governing state respon-

⁷ P.C.I.J., Ser. A/B, No. 76 (1939) 16.

budgetary provision therefor and that such awards could not be contested by the Assembly.¹²⁹

The French Government statement came to the conclusion that there was no legal basis for the Assembly refusing to pay the awards except perhaps in the unlikely circumstance of financial disability facing the Organization.¹³⁰ This would be a reason of necessity, not a reason of law, and the French Government admitted that it merely raised the question theoretically and that it had no practical meaning for the present case.

Undoubtedly the arguments before the Court that were most difficult and had to be met were those put forward by the United States in its insistence on the supreme position of the Assembly, both in creating the Tribunal and in being able to destroy it, as well as the Assembly's position as the final arbiter in the expenditure of funds on behalf of the Organization because of the Assembly's power to approve the budget.

It is interesting that the Court was able to overcome both arguments with a good deal of logic and force. As to the supreme position of the Assembly the Court made it clear that, once the Assembly created an organ, it could not deny the effects which the Statute provided in setting up a United Nations constitutional instrument capable of rendering final and binding judgments. Particularly was this the case when the functions of the organ were to be judicial, functions which the Charter did not vest in the Assembly itself. Again, all of the obligations of the Organization had to be honored by the Organization, and while there may have been a strictly political "power" to refuse to vote the budget or an item therein—although the Court does not spell this out—there was no "legal" right to employ the Assembly's functions in relation to the budget to prevent the payment of a due obligation of the Organization as a whole. In essence, the Court was saying that once a judicial body had been created, its functioning and its awards should be treated as binding in the same way as the decisions of courts under national laws may bind all the organs of the state.¹³¹

VIII. THE NINTH SESSION AND THE SECRETARIAT

The recent session of the Assembly witnessed the climax of these past three years of developments in personnel policies and in the difficulties discussed above. The Secretary General presented to the Fifth Committee an interim personnel report outlining the developments since the Eighth General Assembly and the important changes in the Staff Regulations and Rules.¹³² He presented also his Report on the Organization of the Secretariat describing in detail the reorganization of the various departments of the Secretariat and the appointment of a series of Under Secretaries

¹²⁹ *Ibid.*, at 109-110.

¹³⁰ *Ibid.*, at 22.

¹³¹ *Supra* note 123, at 61: "... it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."

¹³² Report of the Secretary General on Personnel Policy of the United Nations, U.N. Doc. A/2777; also Report of the Fifth Committee, U.N. Doc. A/2862.

with and without departmental responsibilities.¹³² Finally, the Fifth Committee, largely under the leadership of the United States, examined the question of the International Court's opinion in the *Awards Case* with particular reference to the future status of the Tribunal.¹³⁴

It is not possible to deal in detail with all of these matters. Suffice it to say that the Personnel Report disclosed the fact that the machinery contemplated in administering the extremely delicate grounds for dismissal under Regulation 9.1 (a) had been put into force with the establishment of a special Advisory Board, and that during its first session in mid-1954 only two cases were considered and reported on by it.¹³⁵ The Secretary General promised that he would provide the Tenth Session with a review of the principles and standards developed in the work of the Board as required by the Eighth Session in Resolution 782.¹³⁶ Perhaps most interesting of all was the recent appearance of the Report on Standards of Conduct in International Civil Service prepared by the International Civil Service Advisory Board.¹³⁷ The Secretary General properly stressed the importance of this report and, indeed, in many respects it is a classical statement as to standards of behavior for international civil servants. It is significant that the inflammable question of "loyalty" of the international public servant is approached by the Board's Report in the following forthright language:

... an international outlook . . . flows from understanding of and loyalty to the objective and purposes of the international organization as set forth in its Charter or Constitution. The acceptance of the oath of office and of the basic obligation to serve wholeheartedly and completely the organization's interests needs to be worked out in many directions. It involves willingness to try to understand and be tolerant of different points of view, different cultural patterns, and different work habits. It also entails willingness to work without prejudice or bias with persons of all nationalities, religions and cultures. It means a readiness to be continually conscious of how proposals, events and statements of opinion may appear to a very wide range of nationalities . . . In fact, the highest type of loyal international civil servant is one who finds that whatever his personal views he can willingly conform to the observance of his international obligations and support the decisions of the international organization he serves. . . . What is essential is not the absence of personal political or national views but rather restraint at all times . . . in the expression of such views.¹³⁸

In the Fifth Committee the United States, supported at first by Argentina and later by Canada, Chile and Turkey,¹³⁹ presented a draft resolu-

¹³² Organization of the Secretariat, Report of the Secretary General, U.N. Doc. A/2731.

¹³⁴ Report of the Fifth Committee re Awards of Compensation Made by the United Nations Tribunal; Advisory Opinion of the International Court of Justice, U.N. Doc. A/2883.

¹³⁵ Report, *op. cit. supra* note 132, at 7.

¹³⁶ *Supra* note 113.

¹³⁷ U.N. Doc. COORD/CIVIL SERVICE.

¹³⁸ *Op. cit.* at 4.

¹³⁹ Draft resolution of Argentina and U. S. A., U.N. Doc. A/C. 5/L. 317, as amended by U. N. Doc. A/C. 5/L. 321, and U.N. Doc. A/C. 5/L. 321, Rev. 1; also Belgian draft, A/C. 5/L. 322.

tion which sought to solve the awards question once and for all by a compromise, which the United States accepted, namely, an authorization to pay the present awards from a newly-established revolving fund, but a decision on principle to accept the theory of a permanent or *ad hoc* judicial body to provide for appeal from or "review of" the Administrative Tribunal's decisions. In the Fifth Committee there seemed to be much confusion of thought and considerable dispute as to the value of these proposals. In the end an inconclusive vote in the Committee led to a resolution rejecting the principle of appeal and establishing only a special committee to study the problem, in addition to now authorizing payments.¹⁴⁰ But when the matter went to the Plenary Session of the Assembly, the principle "of review"—not appeal—was reasserted with success and a special committee was established to examine the problem in 1955, and to report back to the Assembly at the Tenth Session.¹⁴¹

In the debates in the Plenary Session it must be confessed that Senator Fulbright's arguments as to the desirability for a review on principle were not very convincing. He insisted that judicial review procedure would strengthen the relations between the Secretary General and the staff, declaring that

on his side the Secretary-General will have an assurance that the decisions he makes as the chief administrative officer of the Organization will receive the fullest judicial consideration and that his authority laid down in the Charter and the Staff Regulations will be given full legal respect. On their side the staff will have greater assurance that their legal rights and privileges will be observed.¹⁴²

Perhaps one of the strongest arguments against the United States' position was made by Mr. Sapru of India.¹⁴³ He pointed out that Senator Fulbright in the Fifth Committee and elsewhere may have misread the Court's judgment when he believed the Court recommended the establishment of a judicial review procedure, and in this criticism he seems quite justified.

It now remains for the seventeen named member countries¹⁴⁴ to meet at a time to be fixed in consultation with the Secretary General and to report back to the Fifth Committee at the Tenth Session.

IX. CONCLUSIONS

Since it is now possible to view this long and complex development in some perspective, the following observations seem relevant:

1. The international civil service represented particularly by the United Nations Secretariat has undergone quite severe psychological and administrative distress as a result of allegations concerning its integrity; of claims of espionage and the over-dramatized significance of cases of personnel who refused to testify before United States Senate committees or Federal Grand Juries; of the lack of a clearly defined policy by the Or-

¹⁴⁰ Cited *supra* note 132, at 16-18.

¹⁴¹ U.N. Doc. A/L. 192.

¹⁴² Provisional Record, U. N. Doc. A/P.V. 515, at p. 18.

¹⁴³ *Ibid.* at 21-22.

¹⁴⁴ *Ibid.* at 46.

organization in dealing with the pressures brought to bear upon it by the non-country; and finally, of the reorganization and weeding out processes that have been taking place during the past two or three years, first under the Walters Committee and recently in the reorganization sponsored by the present Secretary General. Nevertheless, out of all of this strain has come some good. It at least has led Member States to define for themselves the constitutional position of the Organization, the Secretariat, and the General Assembly in dealing with staff matters as well as host and Member State relations. And that clarification should lead to greater stability internally as well as in relations of the Organization to all states.

2. Greater clarification has come also to the question of the so-called competing loyalties affecting the international staff member. Men are capable of varieties of loyalties and it is a misuse of the term to confine its application to national political allegiance alone. There is no necessary conflict in loyalties between the civil servant's international responsibilities and his proper national obligations. There may well be a conflict of interests, but that takes place in any situation where differing functions or objectives are involved. Moreover, the composition of the United Nations is such that there may be a rejection by staff members of the state of their original nationality, such as for example employees who are refugees from certain states that are Members of the international organization. Not very many Member States of the free world would insist upon public evidences of loyalty by such refugees to the states from which they have escaped. The demand for loyalty, therefore, cuts more than one way. At the very best it can mean no more than the integrity and good sense set out in the credo quoted above. A host state in particular, and perhaps Member States in general, have a right to expect that their nationals shall not deliberately engage in conspiratorial political action against them. Beyond this the line becomes hard to draw unless there are personal defects, and then the question is no longer one of "loyalty" but one on another level of civil service acceptability.

3. The strengthening of the Secretary General's position *vis-à-vis* staff through the amendments to the Regulations at the Eighth Session suggest that the United Nations may be moving away from the Continental "vested right" model toward the Anglo-American civil service theory with its greater emphasis on managerial discretion. Nevertheless, the present forms within which the Secretariat staff member operates and keeps his position remain much more closely related to the European system than to the continued Anglo-American reliance upon technical legal insecurity offset by traditional non-legal safeguards to protect public service employment.

4. The *Awards Case* provided an opportunity to spell out in greater detail than heretofore the relations of the General Assembly to the Secretariat and to the Administrative Tribunal. It is now clear that the Assembly is not a supreme legislature even with respect to matters confined to it by the Charter; but rather that it is one principal organ of an institution operating within a constitutional framework and it is limited by that framework.

as those limits are spelled out from time to time by judgments of the International Court or by constitutional conventions slowly developing in the various organs of the Organization itself. The role of the Tribunal essentially will be to maintain a balance between the staff and the Secretary General, and its "intrusions" are likely to be in direct ratio to the sense of equity and security engendered in the staff by the Secretary General's employment policies and interpretations of his authority.

5. Finally, it is now evident, if more proof were needed, that international organizations and their staffs need a certain minimum working immunity from local jurisdiction, but that no elaborate claims have been made or need be made for privileges that shelter the staff or the organization from general local law or community relations. It is significant that the debate on the personnel problem has not given rise to any new demands for restating the independence of the Organization or the Secretariat except for the hope expressed by the Secretary General that the Convention on Privileges and Immunities should be adopted by all Members not only for purposes of legal convenience, but for its subtle symbolic value.

6. There remains unresolved as yet the question of access to the United Nations Headquarters site by persons coming from abroad to New York on the business of the Organization and who are not members of delegations. There is some indication that progress is being made to improve the situation. Other host states—Switzerland, France, Italy and Canada—have not raised similar difficulties for their guest international organizations. Again the stabilization of Staff Rules and standards will need to be carried further so as to bring some degree of common practice into the procedures followed by the whole family of the United Nations. Recent developments with respect to changes in the staff rules of UNESCO¹⁴⁵ and dismissals of personnel there suggest that the problem is by no means at an end, although it is not anything like as serious today in numbers or intensity as once it was.

Considering the tensions created by the "cold war" and depth of the political passions and strategic fears, it is remarkable to think that an international, indeed almost universal organization, embracing both "East" and "West," should not only have survived but should be carrying on its political and welfare activities with considerable vigor. The United Nations was never designed to solve the problem of a collision between great Powers. Its constitutional system assumed what all constitutional systems assume, namely, a large measure of agreement on the basic rules of the game which alone can make successful a body politic. The servants of this institution have suffered the accidents of an era that is neither peace nor war but rather a continuing challenge to survive the political and military temptations of the atomic age.

¹⁴⁵ UNESCO Doc. 80/ADM/14 (Aug. 30, 1954), Personnel Policy, Obligations and Rights of Staff Members: Proposed Amendments to the Staff Regulations; and the also General Conference resolution adopting amendments similar to those passed by the U.N. Eighth General Assembly, 80/ADM/35 (Prov.) Dec. 6, 1954, pp. 22-23.

THE CHINESE RECOGNITION PROBLEM

BY QUINCY WRIGHT

Of the Board of Editors

(In a "press conference of January 19, 1955, President Eisenhower en-
vined the possibility of settling the problem of China by recognizing the
existence of "two Chinas"—mainland China, on the one hand, and
Formosa and the Pescadores, on the other—and promoting a non-aggression
agreement between them. From the point of view of international law,
this suggestion involves consideration of (1) the *de facto* situation, (2)
the law of recognition, and the application of that law (3) to mainland
China, (4) to Formosa and the Pescadores, and (5) in American traditions.
From considerations of fact and law, considerations of present na-
tional interest and opinion are important. These considerations will not
be discussed here except insofar as they are implied by considerations of
fact and law. It is believed that it is usually in the national interest to
observe international law.) Such observance maintains national reputation,
which is the major element in obtaining and retaining friends and allies,
and support of the United Nations. Furthermore, international law, ac-
cording to the Family of Nations as a whole, has values which
are greater than those of the particular nation and its laws. It is
therefore the duty of the particular case. It is the
duty of the foreign policy-maker to observe international law. The
national policy-maker must be aware of the fact that the
international community is concerned with the maintenance of the
law of nations. It is therefore important that the national policy-maker
should be aware of the fact that the international community is concerned
with the maintenance of the law of nations. It is therefore important that
the national policy-maker should be aware of the fact that the international
community is concerned with the maintenance of the law of nations.

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a "Pro-Communist" group of the Round Table Conference at Washington
which was held in the Department of State in October, 1949. This group,
the so-called "Gang," had knowledge of C. G. Brown's activities in
October, 1948. The participants agreed that the Communist presence was great
in London, but they did not agree with the presence of the British.
The group recognized by the Third States through their own efforts to
be a small, pro-fifth position as a significant force in the world were
to be eliminated from the United States. See pp. 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 8

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The Republic of China government is the only government in the world which has been recognized by the United States and the United Kingdom. The Republic of China government is the only government in the world which has been recognized by the United States and the United Kingdom. The Republic of China government is the only government in the world which has been recognized by the United States and the United Kingdom.

Formosa and the Pescadores are occupied by Japan in 1895 as a result of the First Sino-Japanese War, and continued part of the Japanese Empire until the withdrawal of Japan following its surrender in 1945, and to be formally renounced by Japan in the Treaty of Peace of 1951. These islands were occupied by the government of Chiang Kai-shek in 1945 in pursuance of the Cairo Declaration of 1943, and the Nationalist Government from which Chiang Kai-shek temporarily fled evacuated there and then established its headquarters in Formosa in January 1949. It has since greatly increased its political and military control of Formosa and the Pescadores since then and there is no evidence of any intention of withdrawal. The United States and most other governments have not recognized the Communist government of the People's Republic of China, but the government of Chiang Kai-shek as the only government of China. It has government continues to represent China to the United Nations and its specialized agencies. The only international organizations which recognize the government of Chiang Kai-shek as the only government of China are the United Nations and the United Nations specialized agencies. The only international organizations which recognize the government of Chiang Kai-shek as the only government of China are the United Nations and the United Nations specialized agencies.

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and law leaves considerable room for the action of states and governments. In practice, however, the facts which under international law are usually established by treaty, but these facts are usually the result of the action of states and cannot be established automatically, and because states are not usually recognizing facts not yet established or by the action of states which are at the moment established, recognition is in practice a measure contributive of the establishment of facts and is not the sufficient evidence of the facts.

(The emphasis is on the fact that the principle of diplomatic comity is based on the principle that the action of a state (or of a government) is a question of fact, and that whenever and wherever the facts are established, the principle of diplomatic comity is applicable.)

The principle of diplomatic comity is a principle of international law, and it is a principle of international law which is based on the principle that the action of a state (or of a government) is a question of fact, and that whenever and wherever the facts are established, the principle of diplomatic comity is applicable. The principle of diplomatic comity is a principle of international law, and it is a principle of international law which is based on the principle that the action of a state (or of a government) is a question of fact, and that whenever and wherever the facts are established, the principle of diplomatic comity is applicable.

control must also be secured over the relations of the public procedure for securing the interests of the people. Publicly expressed opinions or emotionalities with which some balloons may depart, will not from undulating and the atmosphere especially under the disturbed conditions of the world.

The recognition of a new government of an old state implies that there is a breach in the constitutional order, it does not imply that there is a breach in the international order. It is assumed that the new government will observe the obligations of the state under international law. Usually governments seeking recognition loudly assert their intention to do so. Sometimes such governments have given an interpretation of international law which are delinquent but only because they have forgotten international law altogether.

The Soviet Government in its early days also asserted its intention to observe the obligations of the state under international law. It issued an obligation to pay debts and to conduct foreign property in accordance with the principles of international law. It was, however, not by the Soviet Government that the international law was added to the list of obligations of the state. It was added by the Soviet Government to the list of obligations of the state.

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According to the 18th century, the States are obliged to recognize the recognition of new political changes effected by legal aggression but it is hardly applicable to the recognition of new governments not involving territorial changes and control. It is considered applicable to territorial recognition. The point we are doubtful of is the capacity of the community of nations to recognize territorial changes through collective action. The duty not to recognize fruits of aggression is owed by states individually to the community of nations and to the community of nations as a whole, not produced from utilizing its legislative authority to recognize or abolish facts. The principle *ex injuria jus non oritur* is a principle of individual recognition but the principle of facts and better applies to collective recognition. The community of nations may eventually pass a means of accommodating law to facts, and if it cannot or will not, we are bound to vindicate the pre-existing law, at least change the law, or at least order is to reestablish the *jura* order is harmony with the facts. The law with the points out.

Interpreting a weak law, fully exposed to the influence of the political and social conditions, the judge is not only a passive recipient of the law, but also an active participant in its interpretation. The judge's role is not merely to apply the law, but to interpret it in light of the principles of justice and equity. The judge's interpretation of the law is not a mere technical exercise, but a creative process that involves the exercise of discretion and the application of reason. The judge's interpretation of the law is not a mere mechanical process, but a creative process that involves the exercise of discretion and the application of reason. The judge's interpretation of the law is not a mere mechanical process, but a creative process that involves the exercise of discretion and the application of reason.

100-443887-151

The following is a list of the names of the persons who have been
 named in the various reports of the Committee on the subject of the
 proposed amendments to the Constitution of the United States, and
 the names of the persons who have been named in the various reports
 of the Committee on the subject of the proposed amendments to the
 Constitution of the United States, and the names of the persons who
 have been named in the various reports of the Committee on the subject
 of the proposed amendments to the Constitution of the United States,

...of the ...
...same ...
...even ...
...different ...
...revolutionary government ...
...this was the situation ...
...believable, in ...
...of the ...
...of outside aid ...
...of independence ...
...and other circumstances

1. Inasmuch as the Communist government of China is a
 2. government, the Sino-Soviet doctrine would not be applicable
 3. to it. Given by the Soviet Government, not only contrary to the
 4. of the Soviet Government to the National Government of China,
 5. but also a virtual conquest of China by the Soviet Government.
 6. China remains an independent state, the Communist government
 7. general *de facto* government, would seem entitled to receive
 8. 9. This conclusion seemed to flow from the memorandum prepared
 10. Secretary of State of the United Nations on March 8, 1950.
 11. 12. Inasmuch as the United Nations is a body of independent
 12. 13. of the United Nations, it is not the creditors of the
 13. 14. of the government of the United States should be given
 14. 15. a permanent membership in the United Nations.
 15. 16. The United Nations is a body of independent
 16. 17. and the Communist government could not be a member
 17. 18. of the United Nations.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a formal address, and it begins with the words "My Countrymen," which is a traditional opening for such a document. The letter discusses the state of the Union at the time and the challenges facing the country.

2. The second part of the document is a report from the Secretary of the Treasury, dated January 1, 1861. It provides a detailed account of the financial state of the government and the country. The report includes information about the federal budget, the national debt, and the state of the economy.

3. The third part of the document is a report from the Secretary of the Interior, dated January 1, 1861. It discusses the state of the public lands, the management of the Indian tribes, and the progress of the various departments under his jurisdiction.

4. The fourth part of the document is a report from the Secretary of the War, dated January 1, 1861. It provides a detailed account of the military forces, the state of the army and navy, and the progress of the various departments under his jurisdiction.

5. The fifth part of the document is a report from the Secretary of the Navy, dated January 1, 1861. It discusses the state of the naval forces, the progress of the various departments under his jurisdiction, and the state of the navy.

6. The sixth part of the document is a report from the Secretary of the State, dated January 1, 1861. It discusses the state of the foreign relations of the United States, the progress of the various departments under his jurisdiction, and the state of the world.

7. The seventh part of the document is a report from the Secretary of the Agriculture, dated January 1, 1861. It discusses the state of the agricultural industry, the progress of the various departments under his jurisdiction, and the state of the country.

8. The eighth part of the document is a report from the Secretary of the Commerce, dated January 1, 1861. It discusses the state of the commercial industry, the progress of the various departments under his jurisdiction, and the state of the country.

9. The ninth part of the document is a report from the Secretary of the Education, dated January 1, 1861. It discusses the state of the educational system, the progress of the various departments under his jurisdiction, and the state of the country.

10. The tenth part of the document is a report from the Secretary of the Public Works, dated January 1, 1861. It discusses the state of the public works, the progress of the various departments under his jurisdiction, and the state of the country.

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(The action of the Communist government of China in the Autumn of 1950, in permitting, and indeed encouraging "volunteers" from China to participate in the North Korean aggression, raised a new issue as to the responsibility and stability of that government, doubtless justifying the steps in further delaying recognition and representation in the United Nations. The conclusion of the armistice on July 27, 1953, again modified the situation. The negotiations which led to the armistice, and the armistice provision calling for a political conference of "both sides" to conclude peace, seemed to recognize first, that the Communist government of China was a belligerent on one side in the hostilities and capable of being a party to an armistice, and second, that the other side in these hostilities, construed to mean the Republic of Korea, the United States and the other members of the United Nations engaged in direct hostilities in Korea, potentially recognized the government as the government of a state capable of entering into a political treaty. The United States particularly was resistant that the political conference must be viewed as a conference of "two sides" and thus seemed to imply that if the negotiations were successful it would enter into a political treaty with Communist China. Such an act would normally constitute recognition. The Communist government of China seemed to have assumed that the Peace Conference, which assembled in the Spring of 1949, such a recognition constituted recognition in this sense. The United States sought to avoid such an implication by declining either to sign or to endorse the agreement reached setting up the China, North Korea and South Korea Commission for the Korea

the presence of Communist China, at the conference "rescaped" Communist cover stories. He did not see the Secretary General of the United Nations in the insurance of a Communist Assembly resolution to discuss China and other members of the United Nations Committee by the Peking government, the resolution was signed on January 1, 1957, by the Secretary General under the name of the United Nations, the Secretary of Foreign Affairs of the United Nations, and the Secretary of Foreign Affairs of the United Nations.

[illegible]

China for going down in suggests that the strains of the war on the United Nations have gone far toward reducing the "Corruption" of the government of China in "most from the point of view of international law, such recognition is to be expected for this reason." Foster Dulles wrote in 1950 before becoming Secretary of State.

17 If the Communist government of China in fact proves itself to be a government of China without serious domestic assistance, then it should be admitted to the United Nations. However, a regime that has not yet become the government of a country through civil war should not be recognized until it has been elected over a reasonable period of time.

On 20 April 1953 (March, 1953) The resolution introduced by New Zealand was mostly approved except for the negative vote of China and the abstention of the British.

Following this refusal, the Soviet Union proposed extension of the "Non-aligned representative" of China, but the Council approved unanimously with exception of the Soviet Union, a United States resolution not to consider a change of Chinese representation at this time. The British representative, supported by the French representative, said the question of China's representation in the United Nations would have to be decided before peaceful and friendly relations could be reestablished between the two governments with interests in the Far East, but discussion of the question in the United Nations would do "more harm than good" while the voices of the members were evidently so deeply divided on this issue. His support of the U. S.-Soviet resolution did not mean that the question should never be considered but "that under the present circumstances were not propitious." (113-6).

... of Fear (New York, Macmillan, 1950) 180. In hearing before the
Committee on Review of the United Nations Charter, in January 1954, the then
State Dept. expressed the opinion that the Nationalist Government "represents
the aspirations and hopes of the Chinese people" (Hearings, 15-16 Feb.
1954) at 20. After detailed study of the question of Chinese representation
in the UN, Herbert W. Briggs concluded in May, 1952, "The only realistic
policy in Korea, it may be easier to recognize that action by the long-suffering
United Nations for the interests of a member containing several hundred million
population, can be served by disregarding the approach of several hundred
million to effective control of China in the United Nations system."
In International Organization 205 (1952). Concerning the "Principle of the
Right to be approached when 'sovereignty' will suggest the recognition of the
government, Charles E. Bennett urged that "the better international law
should recognize the 'will of the people' of China (as well as the
people in favor of that government, and whether that government is a
people in international law." The Recognition of the Communist Government
in A.J.L. 66 (1953). Quoting President Eisenhower's statement in
the UN message (January 1953), that he issued in the course of the
debate, "The United States suggests that 'the principle of the
recognition of a government by international law on the basis of the
Communist controlled society is not a state under international law and
recognition.'" "The State Department, in International Law," 22
July 1953 (New York, February 1953) : 11. The question of China
appears everywhere to be a state in the international system, and
the state which emerged after the Peace of Westphalia in 1648.

IV. THE GOVERNMENT OF FORMOSA

The Communist government of China claims that Formosa and the Pescadores are part of China on the basis of ancient historical appropriation, the predominantly Chinese character of the population, and the Cairo Declaration of December 1, 1943, by which Roosevelt, Churchill and Chiang Kai-shek agreed, "that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China." The Potsdam Declaration of July 26, 1945, made originally by the same three countries, but later accepted by the Soviet Union, was accepted by Japan as the basis of its surrender on August 14, 1945. This Declaration asserted that "the terms of the Cairo Declaration shall be carried out." On the basis of this pronouncement China occupied Formosa and the Pescadores in 1945.

If it were assumed that the Japanese surrender constituted a definitive renunciation of Formosa and the Pescadores and that the Chinese occupation constituted definitive re-annexation of these territories by China (then a Communist government, if recognized as the government of China), China would have a legal claim to these islands. Two objections can be made to this conclusion. First, the Japanese surrender was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace.

In that treaty, signed in San Francisco, September 8, 1951, the Communist government was in control of China and without the concurrence of either of the rival governments of China. Japan did "renounce all rights, titles and claims" to these islands, but "no beneficiary of the renunciation was named." It would appear, therefore, that the rights of the *de facto* occupant, the government of China, would be preserved to, perhaps subject to ultimate validation by the United States.

When concluded, the Treaty of Peace did not mention the islands, but the United States and France ordered the evacuation of the islands by the signatories, and the United States ordered the evacuation of the islands by the signatories, and the United States ordered the evacuation of the islands by the signatories.

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1. The United States is strongly in favor of the...
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of the United States...
in the year 1950.

4. The United States is strongly in favor of the...
of the United States...
in the year 1950.

and *de facto* recognition.) It declared its own independence in 1776 and in 1793 promptly recognized the French Revolutionary Government, although the hands of the latter were still fresh with the blood of Louis XVI, whose aid had contributed to realization of that Declaration. On March 12, 1793, Secretary of State Jefferson wrote to Gouverneur Morris, American Minister in Paris:

We surely cannot deny to any nation that right wherein our own government is founded—that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded.

A month later President Washington submitted to his cabinet the question of receiving Citizen Genet as representative of the new French Republic. Secretaries Hamilton and Knox thought qualifications should be attached to this reception, but Washington received Genet without qualification.⁴¹ In pronouncing the Monroe Doctrine a generation later and in promptly recognizing numerous new states and governments during the next century, the United States combatted efforts to import concepts of the "legitimacy" or constitutionality of internal changes into international law. Revolution was considered a right whose fruits should be recognized when firmly established "according to the will of the nation."⁴²

It is true that in the twentieth century there were departures from this principle. Practices of non-recognition were pursued in Central America, Mexico and other Latin American countries to discourage revolution and promote stability. The prolonged non-recognition of the Soviet Government and the Communist government of China were said to be justified by the repudiation or neglect of obligations under international law by those governments.⁴³ The non-recognition of Manchukuo, of Mussolini's conquest of Ethiopia, of Hitler's conquest of Austria, and of Stalin's conquest of the Baltic states was considered a legal obligation flowing from commitment to discourage aggression. (In other cases, premature recognition, as of Cuba (1898), Panama (1903), Czechoslovakia (1918), and Poland (1919), was justified by doubt whether the *de facto* situation corresponded to the will of the people.) In these cases there was also disposition to intervene to assist the realization of that will. In other cases during the same period *de facto* dictatorships were recognized without consideration of popular consent.⁴⁴

International law does not even require consideration of circumstances which provide evidence of the probable durability of a government established in fact, but it considers the internal ideology, economy and policy of a government relevant only if they impair its capacity to meet

⁴¹ Moore, *Digest of International Law*, Vol. 1, 120.

⁴² *Id.*, at 121.

⁴³ See Lauterpacht, *Recognition*

⁴⁴ 93 *Am. J. Int'l L.* 166.

THE CHINESE RECOGNITION PROBLEM

international responsibilities.⁴³ To refuse recognition solely because of antipathy to a government's internal practices in these matters constitutes intervention in its domestic jurisdiction. As President Eisenhower said on April 16, 1953:

Any nation's right to a form of government and an economic system of its own choosing is *inalienable*. Any nation's attempt to lieg to other nations their form of government is *indefensible*.⁴⁴

The United States has in the main adhered to this position established in Washington and Jefferson. Thus Secretary of State Fish said in 1877:

The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and to discharge its internal duties and its external obligations.⁴⁵

This position closely accords with the position of contemporary international law on the subject as stated by a leading international lawyer, now judge of the International Court of Justice:

✓ Whenever the requisite conditions of governmental capacity exist recognition is due as a matter of right. Once the revolutionary government may fairly be held to enjoy, with a reasonable prospect of permanency, the obedience of the mass of the population, and once it is in effective control of the bulk of the national territory, it is entitled to recognition. Its revolutionary origin or the methods of the revolutionary change is irrelevant.⁴⁶

These principles have been developed in the United States by executive practice and pronouncement. Presidential competence in the field of recognition has been established by both practice and judicial interpretation of the Constitution. In recognizing new governments and delegations Congress has not been consulted by the President, though in the recognition of new states such consultation has sometimes been requested.⁴⁷ The practice has tended to minimize the influence of national passions and prejudices and to maximize the influence of international law and the facts of the situation. The Congressional resolution of June, 1953, opposing the representation of Communist China in the United Nations, and the Congressional resolution of January 29, 1955, implying that the coastal island may be associated with Formosa in measures of defense,⁴⁸ even though

⁴³ G. Wright, *The Control of American Foreign Relations* (New York: Macmillan, 1922), 13-20.

⁴⁴ 23 Dept. of State Bulletin 599 (1953).

⁴⁵ 1 Moore, *Digest* 250.

⁴⁶ Lauterpacht, *Letter to the London Times*, Jan. 6, 1950, note 9, *supra*.

⁴⁷ Moore, *op. cit.* at 245; Wright, *Control of American Foreign Relations*, 203.

⁴⁸ Reciting the strategic importance of Formosa and the Pescadores, the resolution authorizes the President to use the armed forces to protect them against future attack; this authority to include the securing and protection of such island positions and territories of that area not in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of

adhered by the President, run counter to this tradition. Such resolutions, if specific and mandatory, are of doubtful constitutionality and are likely to hamper policies grounded on international law and contributing to national security and international tranquillity.

CONCLUSION

If we assume, as the available evidence suggests, that the Communist and the Nationalist governments are, respectively, established—the one in mainland China and the other in Formosa and the Pescadores—with sufficient administrative efficiency, public support, and respect for international obligations to make it unlikely that they will be overthrown from internal rebellion or external invasion in any foreseeable future, the following propositions appear to be legal consequences:

1. The United States is free to recognize the Communist government as the government of China and to do so would be in accord with its traditional policy and the normal expectations of international law.

2. The United States is free to recognize Formosa and the Pescadores as an independent state under the Nationalist Government, and to do so would accord with traditional practice and the principles of the United Nations Charter, provided free and fair elections indicate that an independent state of Formosa under the Nationalist Government conforms to the wishes of the inhabitants.

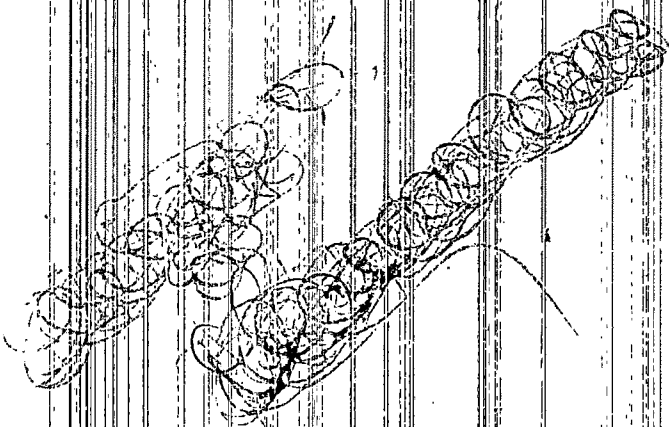
3. While the United States may not be under a positive obligation to recognize the Communist government as the government of China, that government appears to be the general *de facto* government of China, and as such is alone capable of committing China under international law, and alone entitled to represent China in international transactions. It would, therefore, appear that the United States should no longer support the representation of China by the Nationalist Government or oppose its representation by the Communist government in the United Nations and the Specialized Agencies.

The United States appears to have recognized the "Nationalist Government" as the government of Formosa and the Pescadores in making a treaty with that state guaranteeing these islands against attack, provided it does not itself launch an attack upon the mainland. It is not suggested that the

United States has two Pescadores. 32 Dept. of State Bulletin 216 (1957). The address on June 14, 1955, Secretary of State Dulles said "The United States has no intention of sending the curse of war to the people of Formosa, and the United States has no intention of sending the curse of war to the people of the Pescadores." The basic purpose is to assure that Formosa and the Pescadores are not to be used as a base for the Chinese Communist Government. The strategic importance of Formosa and the Pescadores is emphasized by the fact that they might be used as a base for the Chinese Communist Government.

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the only claim to be the government of China. (Political conditions seem more favorable to the general recognition of the Communist government as the government of China and the admittance of its representatives to the organs of the United Nations. Mutual guarantees of non-aggression between China and Formosa might be achieved provisionally even before these states formally recognize each other. A negotiation dealing with all these aspects of the problem might establish a more tranquil situation in the Far East.)



STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW

BY F. V. GARCÍA-AMADOR

Member of the International Law Commission of the United Nations

(During its eighth regular session, the General Assembly of the United Nations considered "that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified." To this end, the Assembly requested the International Law Commission to undertake the codification of these principles.¹ The Tenth Inter-American Conference held in Caracas March 1-28, 1954, adopted a similar resolution.) Considering that "The American Continent has made a notable contribution to the development and to the codification of the principles of international law that govern the responsibility of the State," the Conference resolved to entrust the Inter-American Council of Jurists and its Permanent Commission, the Inter-American Juridical Committee of Rio de Janeiro, with the preparation of a study or report on the subject.²

As is true with respect to other topics of international law, the codification of the principles governing state responsibility is not a task that can be confined today to a mere enumeration and systematization of the various legal rules that theory and practice have established on the subject.) It is not difficult to understand why this codification cannot be undertaken as a pure and simple restatement of existing rules. (These rules were created and have developed according to some fundamental views and concepts which have undergone a profound transformation in contemporary international law.) In particular this transformation has affected in a very substantial way the traditional view of international personality. And it is quite evident that the traditional concept of the subjects of international law has governed the theory and practice of responsibility, especially as it refers to damages caused to the person or property of aliens. (There are also new concepts regarding the penal responsibility of states and in general with respect to some international obligations which were unknown to traditional law.) In short, the codification of the principles of international

¹ Resolutions adopted by the General Assembly during its Eighth Session. Official Documents, Supp. No. 17 (A/2630) Res. 799 (VIII). The resolution was submitted by the Delegation of Cuba in the course of the discussion of a Report of the International Law Commission (cf. Docs. A/C. 6/L. 311 and A/C. 6/SR. 394).

² Res. CIV, Final Act of the Tenth Inter-American Conference (Caracas, March, 1954); 48 A.J.I.L. Supp. 123 (1954). This resolution was also submitted by the Delegation of Cuba, which took into account that, according to the pertinent statements, the relations and co-operation between the International Law Commission and the Inter-American bodies entrusted with the development and codification of international law should be promoted (cf. Doc. 247, SG-151).

nationals respect for the rules of international law." (In consequence of this principle, stateless persons have been deprived of the protection of the rules of "common international law" of aliens, to use the expression devised by the former Permanent Court; despite the fact that they practically possessed that *status* in municipal law. This principle has also given rise to the problems of double or multi-nationality cases. A corollary of the same principle has been that the nature and amount of the reparation claimed have as a rule been determined by the state, not by the individual or legal person injured.)

There would undoubtedly be serious difficulties if an attempt were made to retain this principle and its corollaries, with all their traditional rigidity, in a codification consistent with certain basic postulates of contemporary international law. The international recognition and protection of human rights are facts whose consequences must inevitably affect the right or capacity to bring international claims. Actually, it is very difficult today to maintain the opinion that the state is responsible only with respect to another state; and that in the cases of responsibility for damages to the person or property of aliens there is not a violation of the right of an individual, but merely of the right of the state to insure that such individual be treated in conformity with international law. But in one way or the other, when internationally recognized human rights are at stake, the only and sole possible holder of such rights is the individual because it is precisely to this aim that recognition is granted. In the other hypothesis—such as those of contractual rights—it is only by virtue of a pure fiction, a fiction devised to protect the political prestige and other interests of the state, that one may deny that the true and only subject of those rights is again the individual.

On the other hand, if a solution of the procedural problem of the claim is really (what was) sought, then what should have been done was to recognize in the interested party, in the form and conditions deemed appropriate, a right or procedural remedy. Practice in this respect has been, in a sense, more far-reaching than theory, as is shown by those cases in which an international procedural capacity was granted to private individuals. Reference is made to the *locus standi* which was granted to individuals before the arbitral tribunals set up under Articles 297 and 304 of the Treaty of Versailles, and more particularly to the much more independent position they enjoyed before the Central American Court of Justice and before the Arbitral Tribunal for Upper Silesia set up under the German-Polish Convention of May 15, 1922. The capacity of international civil servants and other persons in respect of the League of Nations and the United Nations Administrative Tribunals are also precedents which are to some extent related to the specific question under discussion. The capacity of the individual directly to acquire international rights, together with the antecedents just mentioned, shows a definite trend of international law, a trend which cannot be ignored when the principles governing state respon-

¹P.C.I.J., Ser. A/B, No. 76 (1939) 16.

budgetary provision therefor and that such awards could not be contested by the Assembly.¹²⁹

The French Government statement came to the conclusion that there was no legal basis for the Assembly refusing to pay the awards except perhaps in the unlikely circumstance of financial disability facing the Organization.¹³⁰ This would be a reason of necessity, not a reason of law, and the French Government admitted that it merely raised the question theoretically and that it had no practical meaning for the present case.

Undoubtedly the arguments before the Court that were most difficult and had to be met were those put forward by the United States in its insistence on the supreme position of the Assembly, both in creating the Tribunal and in being able to destroy it, as well as the Assembly's position as the final arbiter in the expenditure of funds on behalf of the Organization because of the Assembly's power to approve the budget.

It is interesting that the Court was able to overcome both arguments with a good deal of logic and force. As to the supreme position of the Assembly the Court made it clear that, once the Assembly created an organ, it could not deny the effects which the Statute provided in setting up a United Nations constitutional instrument capable of rendering final and binding judgments. Particularly was this the case when the functions of the organ were to be judicial, functions which the Charter did not vest in the Assembly itself. Again, all of the obligations of the Organization had to be honored by the Organization, and while there may have been a strictly political "power" to refuse to vote the budget or an item therein—although the Court does not spell this out—there was no "legal" right to employ the Assembly's functions in relation to the budget to prevent the payment of a due obligation of the Organization as a whole. In essence, the Court was saying that once a judicial body had been created, its functioning and its awards should be treated as binding in the same way as the decisions of courts under national laws may bind all the organs of the state.¹³¹

VIII. THE NINTH SESSION AND THE SECRETARIAT

The recent session of the Assembly witnessed the climax of these past three years of developments in personnel policies and in the difficulties discussed above. The Secretary General presented to the Fifth Committee an interim personnel report outlining the developments since the Eighth General Assembly and the important changes in the Staff Regulations and Rules.¹³² He presented also his Report on the Organization of the Secretariat describing in detail the reorganization of the various departments of the Secretariat and the appointment of a series of Under Secretaries

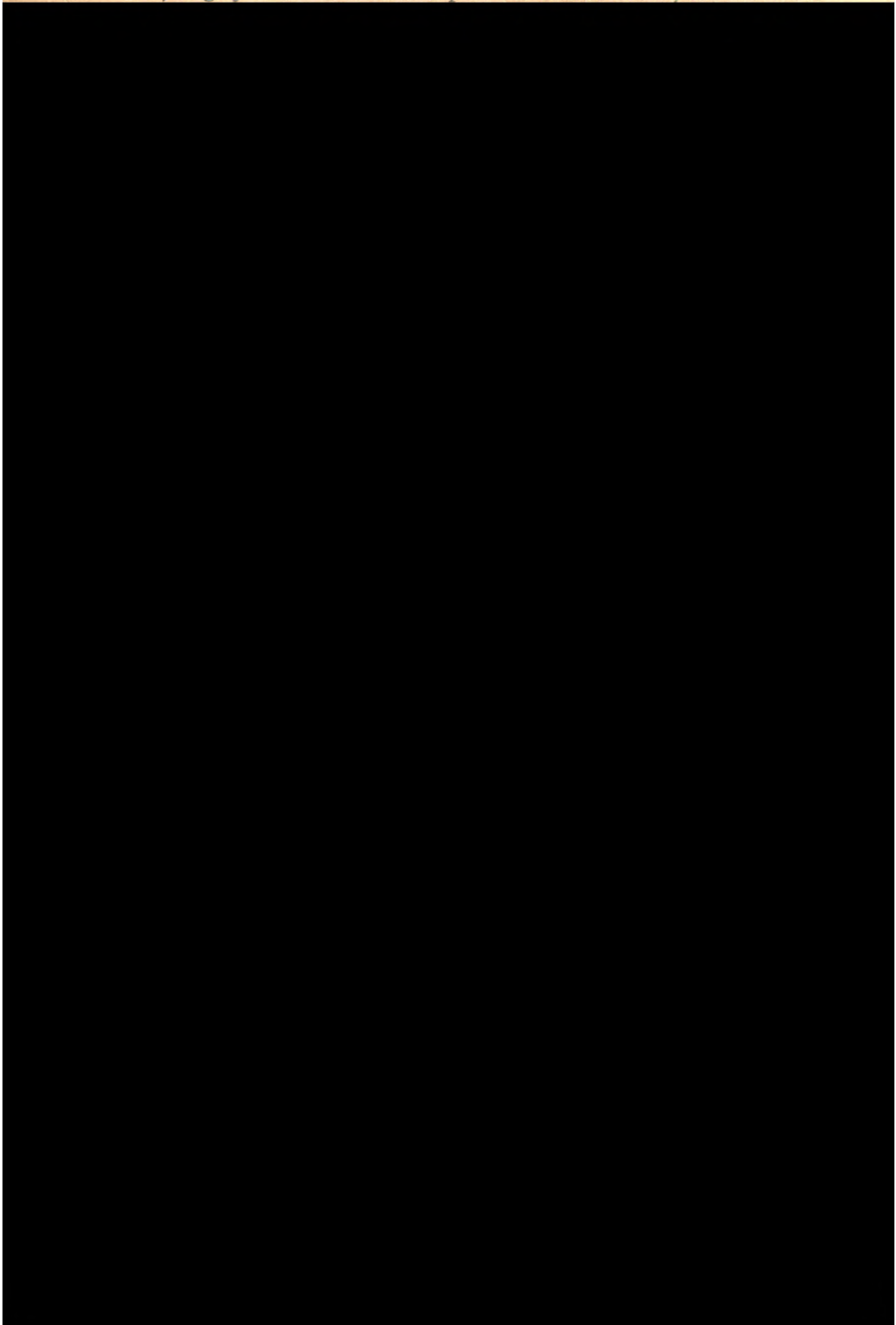
¹²⁹ *Ibid.* at 109-110.

¹³⁰ *Ibid.* at 22.

¹³¹ *Supra* note 123, at 61: "... it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being."

¹³² Report of the Secretary General on Personnel Policy of the United Nations, U.N. Doc. A/2777; also Report of the Fifth Committee, U.N. Doc. A/2862.

with and without departmental responsibilities.¹⁴³ Finally, the Fifth Committee, largely under the leadership of the United States, examined the



tion which sought to solve the awards question once and for all by a compromise, which the United States accepted, namely, an authorization to pay the present awards from a newly-established revolving fund, but a decision on principle to accept the theory of a permanent or *ad hoc* judicial body to provide for appeal from or "review of" the Administrative Tribunal's decisions. In the Fifth Committee there seemed to be much confusion of thought and considerable dispute as to the value of these proposals. In the end an inconclusive vote in the Committee led to a resolution rejecting the principle of appeal and establishing only a special committee to study the problem, in addition to now authorizing payments.¹⁴⁰ But when the matter went to the Plenary Session of the Assembly, the principle "of review"—not appeal—was reasserted with success and a special committee was established to examine the problem in 1955, and to report back to the Assembly at the Tenth Session.¹⁴¹

In the debates in the Plenary Session it must be confessed that Senator Fulbright's arguments as to the desirability for a review on principle were not very convincing. He insisted that judicial review procedure would strengthen the relations between the Secretary General and the staff, declaring that

on his side the Secretary-General will have an assurance that the decisions he makes as the chief administrative officer of the Organization will receive the fullest judicial consideration and that his authority laid down in the Charter and the Staff Regulations will be given full legal respect. On their side the staff will have greater assurance that their legal rights and privileges will be observed.¹⁴²

Perhaps one of the strongest arguments against the United States' position was made by Mr. Sapru of India.¹⁴³ He pointed out that Senator Fulbright in the Fifth Committee and elsewhere may have misread the Court's judgment when he believed the Court recommended the establishment of a judicial review procedure, and in this criticism he seems quite justified.

It now remains for the seventeen named member countries¹⁴⁴ to meet at a time to be fixed in consultation with the Secretary General and to report back to the Fifth Committee at the Tenth Session.

IX. CONCLUSIONS

Since it is now possible to view this long and complex development in some perspective, the following observations seem relevant:

1. The international civil service represented particularly by the United Nations Secretariat has undergone quite severe psychological and administrative distress as a result of allegations concerning its integrity; of claims of espionage and the over-dramatized significance of cases of personnel who refused to testify before United States Senate committees or Federal Grand Juries; of the lack of a clearly defined policy by the Or-

¹⁴⁰ Cited *supra* note 132, at 16-18.

¹⁴¹ U.N. Doc. A/L. 192.

¹⁴² Provisional Record, U. N. Doc. A/P.V. 515, at p. 18.

¹⁴³ *Ibid.* at 21-22.

¹⁴⁴ *Ibid.* at 46.

ganization in dealing with the pressures brought to bear upon it by the host country; and finally, of the reorganization and weeding-out processes that have been taking place during the past two or three years, first under the Walters Committee and recently in the reorganization sponsored by the present Secretary General. Nevertheless, out of all of this strain has come some good. It at least has led Member States to define for themselves the constitutional position of the Organization, the Secretariat, and the General Assembly in dealing with staff matters as well as host and Member State relations. And that clarification should lead to greater stability internally as well as in relations of the Organization to all states.

2. Greater clarification has come also to the question of the so-called competing loyalties affecting the international staff member. Men are capable of varieties of loyalties and it is a misuse of the term to confine its application to national political allegiance alone. There is no necessary conflict in loyalties between the civil servant's international responsibilities and his proper national obligations. There may well be a conflict of interests, but that takes place in any situation where differing functions or objectives are involved. Moreover, the composition of the United Nations is such that there may be a rejection by staff members of the state of their original nationality, such as for example employees who are refugees from certain states that are Members of the international organization. Not very many Member States of the free world would insist upon public evidences of loyalty by such refugees to the states from which they have escaped. The demand for loyalty, therefore, cuts more than one way. At the very best it can mean no more than the integrity and good sense set out in the credo quoted above. A host state in particular, and perhaps Member States in general, have a right to expect that their nationals shall not deliberately engage in conspiratorial political action against them. Beyond this the line becomes hard to draw unless there are personal defects, and then the question is no longer one of "loyalty" but one on another level of civil service acceptability.

3. The strengthening of the Secretary General's position *vis-à-vis* staff through the amendments to the Regulations at the Eighth Session suggest that the United Nations may be moving away from the Continental "vested right" model toward the Anglo-American civil service theory with its greater emphasis on managerial discretion. Nevertheless, the present forms within which the Secretariat staff member operates and keeps his position remain much more closely related to the European system than to the continued Anglo-American reliance upon technical legal insecurity offset by traditional non-legal safeguards to protect public service employment.

4. The *Awards Case* provided an opportunity to spell out in greater detail than heretofore the relations of the General Assembly to the Secretariat and to the Administrative Tribunal. It is now clear that the Assembly is not a supreme legislature even with respect to matters confined to it by the Charter; but rather that it is one principal organ of an institution operating within a constitutional framework and it is limited by that framework

as those limits are spelled out from time to time by judgments of the International Court or by constitutional conventions slowly developing in the various organs of the Organization itself. The rôle of the Tribunal essentially will be to maintain a balance between the staff and the Secretary General, and its "intrusions" are likely to be in direct ratio to the sense of equity and security engendered in the staff by the Secretary General's employment policies and interpretations of his authority.

5. Finally, it is now evident, if more proof were needed, that international organizations and their staffs need a certain minimum working immunity from local jurisdiction; but that no elaborate claims have been made or need be made for privileges that shelter the staff or the organization from general local law or community relations. It is significant that the debate on the personnel problem has not given rise to any new demands for restating the independence of the Organization or the Secretariat except for the hope expressed by the Secretary General that the Convention on Privileges and Immunities should be adopted by all Members not only for purposes of legal convenience, but for its subtle symbolic value.

6. There remains unresolved as yet the question of access to the United Nations Headquarters site by persons coming from abroad to New York on the business of the Organization and who are not members of delegations. There is some indication that progress is being made to improve the situation. Other host states—Switzerland, France, Italy and Canada—have not raised similar difficulties for their guest international organizations. Again the stabilization of Staff Rules and standards will need to be carried further so as to bring some degree of common practice into the procedures followed by the whole family of the United Nations. Recent developments with respect to changes in the staff rules of UNESCO¹⁴⁵ and dismissals of personnel there suggest that the problem is by no means at an end, although it is not anything like as serious today in numbers or intensity as once it was.

Considering the tensions created by the "cold war" and depth of the political passions and strategic fears, it is remarkable to think that an international, indeed almost universal organization, embracing both "East" and "West," should not only have survived but should be carrying on its political and welfare activities with considerable vigor. The United Nations was never designed to solve the problem of a collision between great Powers. Its constitutional system assumed what all constitutional systems assume, namely, a large measure of agreement on the basic rules of the game which alone can make successful a body politic. The servants of that institution have suffered the accidents of an era that is neither peace nor war but rather a continuing challenge to survive the political and military temptations of the atomic age.

¹⁴⁵ UNESCO Doc. 8C/ADM/14 (Aug. 30, 1954), Personnel Policy, Obligations and Rights of Staff Members: Proposed Amendments to the Staff Regulations; and see also, General Conference resolution adopting amendments similar to those passed by the U.N. Eighth General Assembly, 8C/ADM/35 (Prov.), Dec. 6, 1954, pp. 22-23.

THE CHINESE RECOGNITION PROBLEM

BY QUINCY WRIGHT

Of the Board of Editors

In a press conference of January 19, 1955, President Eisenhower envisaged the possibility of settling the problem of China by recognizing the existence of "two Chinas"—mainland China, on the one hand, and Formosa and the Pescadores, on the other—and promoting a non-aggression agreement between them. From the point of view of international law this suggestion involves consideration of (1) the *de facto* situation, (2) the law of recognition, and the application of that law (3) to mainland China, (4) to Formosa and the Pescadores, and (5) in American traditions. Apart from considerations of fact and law, considerations of present national interest and opinion are important.¹ These considerations will not be discussed here except insofar as they are implied by considerations of fact and law. (It is believed that it is usually in the national interest to observe international law.) Such observance maintains national reputation, which is the major element in obtaining and retaining friends and allies, and support of the United Nations. (Furthermore, international law, accepted by the Family of Nations as a whole, rests upon values which transcend those of the particular nation and upon an experience which transcends that of the particular case. (It therefore provides a more useful guide to the foreign policy-maker than national law and opinion.)

(The foreign policy-maker must be aware of the prevailing culture, ideology and opinion at home giving evidence of the values defining national interests, but it is even more important that he have accurate knowledge of the conditions of opinion and power abroad without which it is impossible for him to appraise the consequences of alternative decisions upon the realization of those interests. (Foreign policy differs from domestic policy in that its implementation depends on conditions little subject to the control of national law and little understood by the national public. Foreign policy must, therefore, often adapt to conditions which public opinion chooses to ignore or of which it is unaware.) Domestic policy, on the other hand, can usually control the essential conditions if based upon a sufficiently strong public opinion. For this reason, in foreign policy-making, the Executive with superior information on world conditions must play a larger rôle than the legislature primarily influenced by domestic opinions, at least until public education in international relations is far more advanced than it is today.

¹ See Arthur Dean, "United States Foreign Policy and Formosa," 33 Foreign Affairs 360 ff. (1955).

I. THE DE FACTO SITUATION

The Communist government had gained control of substantially all of mainland China by the end of 1949² and has apparently increased the effectiveness of that control since then. There is no evidence of significant movements for revolt among the people. On the contrary, the evidence points to an increase in economic productiveness, to progress in health and sanitation, to relative political stability, and to effective military and political control by the Peiping government in mainland China, though on all these matters more evidence would be desirable.³ The Communist govern-

² The confidential transcript of the Round Table Conference on American Policy toward China, held in the Department of State in October, 1949, among about thirty officials, business men, and educators with direct knowledge of China, was released in October, 1951. The participants believed that the Communist government was about to take over China, that it would do so with acquiescence of the people, and that it should be recognized by the United States, though there were some differences as to the advisability of delaying recognition as a bargaining matter or to permit a more favorable opinion to develop in the United States. See pp. 410 ff., especially statement of William R. Herod, International General Electric Co., p. 422. The report on American Policy toward China published by the New York Council on Foreign Relations in March, 1950, after British recognition of the Communist government but before outbreak of the Korean hostilities, tabulated the opinion of 720 leading business men, lawyers, educators, journalists and others in 23 large cities distributed over the United States. On the proposition, "Effective military opposition to the Chinese Communist regime on the mainland of China has come to an end," 90% agreed, 8% were uncertain, 2% disagreed. On the proposition, "The result of the civil war in China was largely the product of internal Chinese processes," 65% agreed, 17% were uncertain, 18% disagreed. On the proposition, "The United States should recognize the Chinese Communist regime if that regime provides acceptable guarantees covering American lives and property and agrees to carry out China's treaty obligations," 56% agreed, 24% were uncertain, 20% disagreed (pp. 6, 9, 11, 37). See also Earl H. Pritchard, "Political Ferment in China, 1911-1951," and George E. Taylor, "The Hegemony of the Chinese Communists, 1945-1950," 277 Annals of American Academy of Political and Social Science 1 ff., 13 ff. (1951).

³ George S. Gale, labor editor of the Manchester Guardian, on returning from a visit to China with the British Labor Party group headed by former Prime Minister Clement Attlee in September, 1954, said: "I think it is absolute tripe to imagine that if China were given free elections, she would choose any government but a Communist one. . . . There is no doubt whatever that the present government of Mao Tse-tung and Chou En-lai is the effective government of China and not only the effective government of China but the most effective government the place has ever had. . . . Basically China has been cleaned up physically. . . . They are getting themselves industrialized at a pretty fast rate and with a certain amount of success. . . . They claim, probably with a good deal of exaggeration, to have brought the major diseases of the country under control. . . . The improvement in communication has been effective. It has helped pretty largely in bringing rice surpluses from the south, east, or wherever else it is, to the areas which suffered from a lack of basic foods. . . . There is no bribery, no corruption, in the administration of the place." This appears to reflect the general impression of the Labor Party group (University of Chicago Round Table, "Red China: Conflict in British and American Policy," Sept. 26, 1954, pp. 4, 7). Alfred W. Jenkins in the Office of Chinese Affairs, Department of State, though vigorously criticizing the barbarities and breaches of international law by the Communist government as did the British Labor group, and warning that the Communist government does not represent the masses of the Chinese people and ought not to be recognized.

ment was recognized as the government of China before the outbreak of Korean hostilities in June, 1950, by sixteen Members of the United Nations (Afghanistan, Burma, Byelorussia, Czechoslovakia, Denmark, India, Israel, Netherlands, Norway, Pakistan, Poland, Sweden, Ukraine, United Kingdom, U.S.S.R. and Yugoslavia) and by eleven non-member states (Albania, Bulgaria, Ceylon, Finland, Eastern Germany, Hungary, North-east Korea, Mongolia, Rumania, Switzerland, and Viet Minh).⁴ Indonesia has recognized it subsequently. Of these twenty-eight states, thirteen belong to the Communist group of states. Of the fifteen states not allied with the Soviet Union, eight are European and seven Asiatic.

The area controlled by the Communist government includes the entire territory of China as it existed before World War II, with the exception of Outer Mongolia, the independence of which that government has recognized, and a few small islands off the coast near Amoy (Quemoy and Matsu) which were still occupied by the Nationalists in July of 1955. In addition, the Communist government appears to have strengthened its control of Tibet and Sinkiang, whose status as parts of China was nominal

January, 1955: "The streets are reported to be cleaner, and there have been spotty advances in public health. . . . There have been some advances in industrial recovery and in new industrial enterprises. . . . It would be a mistake to assume that there is not tremendous force behind the so-called 'New China.' Most of this force derives from the energy of the true Asian revolution, which in China has been captured and imperfectly but dangerously harnessed by communism—but force is there. . . . Last but not least, the Chinese Communist regime, while it has certainly not brought to the Chinese a national dignity by its lawless acts, has managed to get very much into the limelight and with Soviet help has achieved a military potential of menacing proportions. . . . Even those Chinese who in their hearts oppose the regime must derive some satisfaction from this 'prestige,' even though they may have vastly preferred that it be attained by more honorable means." 32 Dept. of State Bulletin 6-7 (1955). In an address of March 21, 1955, Secretary of State Dulles, while regretting Chinese Communists' "intoxication" with "successes" and their apparently exaggerated opinion of their actual power position, recited an impressive list of "successes" flowing from the military and political consolidation of China since they "completed conquest of the China Mainland" in 1949. *Ibid.* at 551. Utilizing available statistics, Alexander Eckstein concluded: "The Chinese economy—after being more or less stationary for centuries, with only erratic and partial spurts of growth in recent decades—seems to be entering, for better or for worse, a self-sustaining growth process." "Conditions and Prospects for Economic Growth in Communist China," 7 World Politics 434 (1955). W. W. Rostow and Associates, in *The Prospects of Communist China* (New York, Wiley, 1954), support the above points with extensive data (pp. 171, 278) and present a well-balanced summary of the factors—economic, social, cultural, administrative, and political—favorable and unfavorable to continuance of the regime (pp. 44, 122, 142). Though he considers the prospects on the whole favorable, he notes that the initial energy and success of the regime may flag out after a generation or two as in the case of the Ch'in (225-206 B.C.), Sui (589-618 A.D.), and Yuan (1260-1368 A.D.) dynasties (p. 120).

⁴ Information obtained from United Nations Secretariat, June, 1950. See also United Nations Year Book (1950) 427, 429. The Communist states recognized the Peking government in October, 1949, Burma and India followed in December, most of the rest in January, 1950. News reports indicated that Australia, Canada, New Zealand, Africa, France, Egypt, Mexico and the United States were seriously considering recognition at that time.

before the war. It appears that the Communist government is a "general *de facto* government" of China in the sense used in the *Tinoco Arbitration*,⁵ and in the traditional practice of states. Practice does not deny that status to a government whose predecessor still holds out in an "isolated fortress."⁶

(Formosa and the Pescadores were annexed by Japan in 1895 as a result of its war with China, and continued part of the Japanese Empire *de jure* and *de facto* until the withdrawal of Japan following its surrender in 1945, and *de jure* until renounced by Japan in the Treaty of Peace of 1951. These islands were occupied by the government of Chiang Kai-Shek in 1945 in pursuance of the Cairo Declaration of 1943.) The Nationalist Government from which Chiang had temporarily retired, evacuated mainland China and established its headquarters in Formosa in December, 1949. It has apparently increased its political and military control of Formosa and the Pescadores since, and there is no evidence of widespread dissatisfaction. The United States and most other governments which have not recognized the Communist government of China continue to recognize the government of Chiang Kai-Shek as the Government of China and that government continues to represent China in organs of the United Nations and of the specialized agencies. That government is, however, *de facto* the government only of Formosa and the Pescadores and of some of the small islands off the mainland coast opposite Formosa.

Sporadic hostilities have occurred in some of these small islands, but substantially the Communist government is the *de facto* government of China and the Nationalist Government is the *de facto* government of the former Japanese territory of Formosa and the Pescadores. There are in fact two governments over these areas populated by people largely of Chinese race—China with an area of 3,877,000 square miles and a population of nearly 475,000,000 and Formosa with an area of about 14,000 square miles and a population of about 10,000,000.⁷

⁵ *Great Britain v. Costa Rica*, 1923, 18 A.J.I.L. 2.

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II. THE LAW CONCERNING RECOGNITION

International law leaves considerable discretion to states in recognizing new states and governments. In principle, recognition is *declaratory* of facts which under international law constitute the status in question, but, because these facts are usually so uncertain that international law cannot be applied automatically, and because states may promote their policies by recognizing facts not yet established or by refusing to recognize facts which are at the moment established, recognition may, in practice, be in considerable measure *constitutive* of that status. "General recognition" is deemed to be sufficient evidence of the fact,⁸ nevertheless.

The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a state (or of a government) is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty.⁹

In accord with this principle international law forbids premature recognition of an insurgent or revolutionary government and, apart from the Stimson doctrine, forbids continued non-recognition of a firmly established government. Between the initiation of revolt by a faction and its firm establishment as a government considerable time may elapse and there may also be differences of opinion as to the evidence of firm establishment. Does the evidence indicate sufficient consent of the governed and sufficient respect for national traditions to make internal revolt unlikely? Does it indicate sufficient avoidance of inhumanities shocking to the conscience of mankind and sufficient respect for international law to make external invasion unlikely? How much is sufficient?

According to the Stimson doctrine there is a duty not to recognize a new government whose change established, not primarily by internal action, but by the action of another state in violation of its international law, and whose aggression end and self-determination are in question. In the League of Nations study of

of appraising the relative importance of these forces in both the origin and maintenance of the new regime.¹⁰

There is also a difference in the sufficiency of evidence permitting or requiring recognition of a new government and of a new state. A revolutionary government of an old state, once it gains control of the territory, is usually opposed by no more than a government in exile which lacks both power and rights. But an insurgent government of a new state faces the government of the parent state which usually has considerable power to support its claim of right. In the latter case, therefore, states are more cautious in recognizing the change. Premature recognition will be regarded as intervention by the parent state which may declare war, as did Great Britain against France when the latter recognized the United States in 1778 and as did Spain against the United States when the latter recognized Cuba in 1898. Recognition of a new state is therefore more *constitutive* and less merely *declaratory* than is the recognition of a new government in an old state.¹¹

Admitting the relativity and frequent inconclusiveness of the evidence that a revolutionary government is firmly established, the criteria on which evidence must be sought are usually classified as (1) effective control of the administration and territory at the moment, and (2) expectation that that control will continue for a considerable time.

The first criterion does not present serious problems. Is there an organized government? Does it have civil and military agencies in all parts of the territory? Do they carry out its orders? Are they sufficient to maintain order? Are there centers of resistance in the territory? If there are, how disturbing are their activities?

Evidence justifying the expectation that effective control will continue is more problematic.¹² While the theory of recognition implies a breach of the constitutional order, there can be no doubt but that the degree of this breach, not only legally but also culturally, has relevance to judging the probable persistence of the new order. An extremely radical revolution is less likely to persist than a more moderate one.

The attitude of the people is also significant. While consent of the governed may not be a formal prerequisite of recognition, though the United States has frequently asserted that it is,¹³ there can be no doubt but that the attitude of the people, varying from sullen acquiescence to satisfied acceptance and enthusiastic acclamation, is relevant to judging the prospects of a government. The evidence of such attitudes, varying from casual ob-

¹⁰ League of Nations, Appeal of the Chinese Government, Report of the Commission of Enquiry (Lytton Commission), Oct. 1, 1932, pp. 66 ff., 107 ff., 127; Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 1947), Vol. 1, pp. 132 ff.; United Nations Year Book (1950) 433; notes 14-17 *infra*.

¹¹ Lauterpacht, Recognition 6, 51.

¹² Lauterpacht discusses these issues with great acumen and abundant citation, *ibid.* at 98 ff. See also Debate in General Assembly, *ibid.* Year Book (1950) 429 ff.

¹³ Jefferson said in 1793 the "will of the people" was the "most important thing to be regarded" (note 10 *infra*), and he often insisted upon support by the people in electing a government.

servation by persons in the area and elections controlled by the new government to scientific studies and free and fair elections under impartial international control, must also be scrutinized, without neglecting the relation of a particular procedure for determining attitudes to the culture and customs of the people. Publicly expressed opinions or even votes with formally secret ballots may depart very far from indicating genuine attitudes, especially under the disturbed conditions of revolution.¹⁴

While recognition of a new government of an old state implies that there has been a breach in the constitutional order, it does not imply that there has been a breach in the international order. It is assumed that the new government will observe the obligations of the state under international law, and usually governments seeking recognition loudly assert their intention to do so. Sometimes such governments have set forth interpretations of international law which are debatable, but only rarely have they repudiated international law altogether.

The Soviet Government in its early days characterized international law as a capitalistic institution to be superseded by Marxist dialectical materialism, and denied any obligation to pay debts of the Russian state or to respect foreign property in Russian territory. These pronouncements were made the basis for non-recognition by the United States, thus asserting that respect for international law is a separate criterion for recognition, added to firm establishment in the present and probable future. The United Nations Charter sets out as criteria of admission of new members both ability and willingness to observe international obligations. The prevailing practice, however, has been to regard the applicant government's attitude toward international law, not as a separate criterion, but as evidence of the probable persistence of that government. It is assumed that a government which ignores international obligations is likely to invite reprisals and interventions jeopardizing its existence. Thus, if a government is established with sufficient firmness to assure its ability to fulfill international obligations, it is usually assumed that its will to do so can be assured by the normal sanctions of international law once it functions as a recognized member of the community of nations. It is to be noted that after recognition the Soviet Union withdrew its earlier repudiation of international law, even though it continued to interpret its international obligations in a manner frequently unacceptable to other states.

The same position has generally been taken in regard to atrocities and inhumanities committed by a government in its rise to power. Revolution is usually accompanied by violence, but assassinations and massacres of unusual magnitude have sometimes been made a reason for non-recognition. Here again the tendency has been, not to consider standards of morals or civilization as independent criteria for recognition, but as evidence of the probable persistence of the government. A government which continually shocks the conscience of the world by its brutality invites intervention as

¹⁴ Q. Wright,
University of

ess in International Relations (Berkeley,

much as does a government that violates the more formal obligations of international law.

According to the Stimson doctrine, states are obliged to refrain from recognition of territorial changes effected by illegal aggression, but this is hardly applicable to the recognition of new governments not involving territorial change and has not been considered applicable to collective recognition. There can be no doubt of the capacity of the community of nations as a whole to recognize territorial changes through collective action. The duty not to recognize fruits of aggression is owed by states individually to the victim of aggression and to the community of nations, but the community as a whole is not precluded from utilizing its legislative authority to validate an accomplished fact.¹⁵ The principle *ex injuria jus non oritur* applies to individual recognition but the principle *ex factis jus oritur* applies to collective recognition. The community of nations must eventually have a means of accommodating law to facts, and if it cannot or will not change the facts to vindicate the pre-existing law, it must change the law, or rights under it, to reestablish the jural order in harmony with the facts. As Lauterpacht points out:

International law, being a weak law, is fully exposed to the impact of the phenomenon to which jurists have referred as the "law creating influence of facts." But unless law is to become a convenient code for malefactors, it must steer a middle course between the law creating influence of facts and the principle, which is the essence of law, that its validity is impervious to individual acts of lawlessness. Law is a body of rules operating under the aegis of a system of force actually operative in society. This does not mean that all breaches of the law, if successful, become part of the legal order. A balance must be achieved somewhere. It cannot be found in the immediate validation of the illegal act; it must be sought in considerations of a general nature which would justify the legislator in incorporating the result of the illegality as part of the law.¹⁶

III. THE GOVERNMENT OF CHINA

The Nationalist Government has sought to invoke the Stimson doctrine to prevent recognition of the Communist government as the government of China, asserting that the latter's success was due to aggression by the Soviet Union in violation of its treaties with China, and of the United Nations Charter. The representatives of the Nationalist Government introduced a resolution in the General Assembly of the United Nations on November 26, 1949, declaring that the Soviet Union had violated its obligations under the Charter and treaties with China in assisting the Chinese Communists, and that, therefore, the Members of the United Nations should not give aid to or recognize the Communist government.¹⁷ The General Assembly refused to accept this resolution but passed a general resolution calling upon the

¹⁵ Virginia Beach Memorandum on The Problem of Recognition, in Wright (ed.), *Legal Problems of the Far Eastern Conflict* 193.

¹⁶ Lauterpacht, *Recognition* 427. See also Wright and Lauterpacht, in Wright (ed.), *Legal Problems of the Far Eastern Conflict* 115 ff., 143.

¹⁷ United Nations Year Book (1948-1949) 296. See also ibid. 70.

Members of the United Nations to respect the independence of China, the principles of the United Nations, and treaties relating to China.¹⁸ Subsequently the representative of the Nationalist Government introduced a resolution declaring that the Soviet Union had violated its treaties with China in aiding the Chinese Communists, but omitted reference to obligations under the Charter and to non-recognition.¹⁹ This was passed by the General Assembly on February 1, 1952.²⁰ [The General Assembly] therefore, while asserting that the Soviet Union has violated its treaty obligations, appears to consider that the Stimson doctrine is not applicable to the situation in China. [The acquisition of control by the Communist government was in its opinion a manifestation of the self-determination of the Chinese people rather than a manifestation of aggression by the Soviet Union.] The states which have recognized the Communist government have acted in accord with this opinion. [In fact the China White Paper presented by the Secretary of State to the President of the United States on July 30, 1949, gives strong support to this opinion,²¹ as does the Round Table Conference on American Policy toward China, held in the Department of State from October 6 to 8, 1949.²²

[Even if it were assumed that the illegal Soviet assistance to the Communists was the decisive factor in the success of the latter in China, there is a question of the extent to which the Stimson doctrine would be applicable if the Communist government is firmly established with consent of the people.] That doctrine forbids recognition of territorial change—whether effected by the *de facto* establishment of new states like "Manchukuo" or by *de facto* annexations as of Ethiopia by Italy and of Austria by Germany—when the change has resulted from external aggression without substantial support of the inhabitants of the area. [In such cases the state deprived of territory, as China in the "Manchukuo" case, and the states whose security is jeopardized by changes in the balance of power resulting from annexations, should be free to rectify the situation which has been established by illegal action, and consequently the fruits of aggression should not be recognized. The states whose recognition is necessary to validate these changes should withhold recognition.²³

[When, however, a new government is established in an old state, neither of these circumstances exists, even though some outside aid was given to the revolutionists.] The change is primarily in the constitutional, not in the international, order. Convenience requires that states be represented by a government. Consequently international law favors recognition of a

¹⁸ *Ibid.*, (1948-1949) 298.

¹⁹ *Ibid.*, (1951) 264.

²⁰ United States Relations with China with special reference to the Period 1944-1949 (Department of State, Washington, D. C., August, 1949). Secretary of State Acheson summarized this voluminous material: "It (the Communist revolution in China) was the product of internal forces, forces which this country tried to influence but could not. A decision was arrived at within China, if only a decision by default." (p. xvi.)

²¹ Note 2 *supra*.

²² Virginia Beach Memorandum, note 15 *supra*; Lauterpacht, Recognition 420 ff.; J. R. Beem, "UN Recognition: A Reconsideration," 22 University of Chicago Law J. 261, 277 (1954).

general *de facto* government and, as held in the *Tinoco Arbitration*, considers such a government competent, and alone competent, to act for the state even if it is not generally recognized.²³ The situation is of course different if the outside aid is so extensive as to result in making the revolutionary government a satellite of its benefactor. It has been suggested that this was the situation resulting from the Communist revolutions in Czechoslovakia, in China, and in other Communist states. The applicability of the Stimson doctrine, however, in such cases would depend not on the influence of outside aid in the success of the revolution, but on the lack of independence of the state after the revolution as a result of that aid or of other circumstances.

If it is assumed that the Communist government of China is a general *de facto* government, the Stimson doctrine would not be applicable unless the aid given by the Soviet Union was not only contrary to the obligations of the Soviet Government to the National Government of China but also had resulted in a virtual conquest of China by the Soviet Government. If China continues an independent state, the Communist government, as its general *de facto* government, would seem entitled to recognition.

This conclusion seemed to flow from the memorandum published by the Secretary General of the United Nations on March 8, 1950.²⁴ This memorandum suggested that, apart from individual recognition, the Members of the United Nations in passing upon the credentials of representatives of rival governments of a Member State should be guided only by capacity to perform the obligations of membership. The implication was clear that at that time only the Communist government could perform the obligations of China as a Member.

Prior to the outbreak of hostilities in Korea the Communist government was generally considered a general *de facto* government of China. Many states, non-Communist as well as Communist, recognized it as such,²⁵ and in a letter to the *London Times* of January 6, 1950, Professor Lauterpacht set forth principles of international law suggesting that there was an obligation to recognize that government. As this statement was officially circulated by the British Government, it can perhaps be regarded as indicating the position taken by that government, when it recognized the Communist government on January 10, 1950. There is every evidence that the United States was preparing to recognize the Communist government at the same time. Its failure to do so seems to have been self-inflicted anxiety over internal Communism which arose in the early 1950s Congress.

In retrospect it seems unfortunate that recognition was not given at that time. The Soviet Government appears to have been in a situation which integrated China economically and politically, and American failure to recognize gave the Soviet

²³ See note 5 *supra*.

²⁴ Quoted in Wright, "Some Thoughts about Recognition," see also United Nations Year Book (1950) 424 ff.

²⁵ Note 4 *supra*.

tunity to prolong this situation, first by withdrawing its representatives from United Nations organs and subsequently by stimulating aggression in Korea. These pressures made it difficult for the United Nations to admit Communist China's representation. The Korean incident in June, 1950, did, however, induce President Truman, as a precautionary measure, to order the 7th Fleet to prevent hostilities by either the Communist or the Nationalist Chinese governments in the Formosa Straits. This looked toward recognition of two Chinas. The act of the Eisenhower Administration on February 2, 1953, in modifying this order to permit the Nationalists to attack the mainland ended this implication symbolically, though it made little change practically.

The action of the Communist government of China in the Autumn of 1950, in permitting, and indeed encouraging, "volunteers" from China to participate in the North Korean aggression raised a new issue as to the responsibility and stability of that government, doubtless justifying the states in further delaying recognition and representation in the United Nations. The conclusion of the armistice on July 27, 1953, again modified the situation. The negotiations which led to the armistice, and the armistice provision calling for a political conference of "both sides" to conclude peace²⁶ seemed to recognize first, that the Communist government of China was a belligerent on one side in the hostilities and capable of being a party to an armistice, and second, that the other side in these hostilities, construed to mean the Republic of Korea, the United States and the other Members of the United Nations engaged in direct hostilities in Korea, potentially recognized that government as the government of a state capable of entering into a political treaty. The United States particularly was insistent that the political conference must be treated as a conference of "two sides" and thus seemed to imply that if the negotiations were successful it would enter into a political treaty with Communist China. Such an act would normally constitute recognition.²⁷ The Communist government of China seemed to have assumed that the Geneva Conference, which assembled in the Spring of 1954 for such a negotiation, constituted recognition in this sense. The United States sought to avoid such an implication by declining either to sign or to endorse the agreements reached respecting Indo-China. No agreements were reached concerning Korea.

Nevertheless the presence of Communist China at the conference "inescapably" the Communist government added prestige."²⁸

The Secretary General of the United Nations to Peking in pursuance of a General Assembly resolution, to discuss American and other personnel of the United Nations Command by the Peking government,²⁹ and the invitation extended on January 31, 1955, by the Secretary General, Security Council resolution, to discuss in the Security Council the Straits of Formosa, looked toward recognition

pp. 204 (1953). ²⁷ Lauterpacht, *Recognition* 375 ff. to 3.

(February, 1955).

of the Peking government by the United Nations.³⁰ The refusal of the Peking government to accept the latter invitation until formally admitted as the government of China was at least understandable.³¹

The foregoing discussion suggests that the states of the world and the United Nations have gone far toward recognizing the Communist government as the government of China and that, from the point of view of international law, such recognition is to be expected. To this effect, John Foster Dulles wrote in 1950 before becoming Secretary of State:

If the Communist government of China in fact proves its ability to govern China without serious domestic resistance, then it, too, should be admitted to the United Nations. However, a regime that claims to have become the government of a country through civil war should not be recognized until it has been tested over a reasonable period of time.³²

³⁰ *Ibid.* 5 (March, 1955). The resolution introduced by New Zealand was unanimously approved except for the negative vote of China and the abstention of the Soviet Union.

³¹ Following this refusal, the Soviet Union proposed exclusion of the "Kuomintang representative" of China, but the Council approved unanimously, with exception of the Soviet Union, a United States resolution not to consider a change of Chinese representation at this time. The British representative, supported by the French representative, said the question of China's representation in the United Nations would have to be settled before peaceful and friendly relations could be re-established between the various governments with interests in the Far East, but discussion of the question in the United Nations would do "more harm than good" while the views of Members "are evidently so deeply divided on this issue." His support of the United States resolution did not mean that the question should never be considered but that "the existing circumstances were not propitious." (*Ibid.* 6).

³² War or Peace (New York, Macmillan, 1950) 190. In hearings before the Wiley Committee on Review of the United Nations Charter, in January, 1954, Secretary of State Dulles expressed the opinion that the Nationalist Government "represented the true aspirations and hopes of the Chinese people." 83rd Cong., 2nd Sess., Hearings, Pt. I, at 20. After detailed study of the question of Chinese representation in the United Nations, Herbert W. Briggs concluded in May, 1952: "When peace is reestablished in Korea, it may be easier to recognize that neither the long range interests of the United Nations nor the interests of a member containing perhaps one-fifth of the world's population, can be served by disregarding the unpalatable fact that the only government in effective control of China is the Chinese Communist government." 6 *International Organization* 209 (1952). Conceding, in October, 1953, that the time may be approaching when "expediency" will suggest the recognition of the Communist government, Charles G. Fenwick urged that "the test of international law" be also considered—whether the "will of the people" of China has been "substantially declared" in favor of that government, and whether that government is prepared to observe international law. "The Recognition of the Communist Government of China," 47 *A.J.I.L.* 666 (1953). Quoting President Eisenhower's assertion in his state of the Union message (January, 1955), that the issue in the cold war is "the true nature of man," Gray L. Dorsey suggests that Communism repudiates the concept of man assumed by international law on the basis of Western philosophy, and consequently "a Communist controlled society is not a state under international law and should not be recognized." "The State, Communism, and International Law," *Washington University Law Quarterly* (February 1955) 1 ff. The opinions of Briggs, Fenwick and Dorsey appear successively to illustrate a more subjective and abstract interpretation of the state. Such an interpretation departs from the objective and concrete conception of the state which emerged after the Peace of Westphalia and which has distinguished

IV. THE GOVERNMENT OF FORMOSA

The Communist government of China claims that Formosa and the Pescadores are part of China on the basis of ancient historical connection, the predominantly Chinese character of the population, and the Cairo Declaration of December 1, 1943, by which Roosevelt, Churchill and Chiang Kai-Shek agreed, "that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China." The Potsdam Declaration of July 26, 1945, made originally by the same three countries, but later accepted by the Soviet Union, was accepted by Japan as the basis of its surrender on August 14, 1945. This Declaration asserted that "the terms of the Cairo Declaration shall be carried out." On the basis of this pronouncement China occupied Formosa and the Pescadores in 1945.

If it were assumed that the Japanese surrender constituted a definitive renunciation of Formosa and the Pescadores and that the Chinese occupation constituted definitive re-annexation of these territories by China, then the Communist government, if recognized as the government of China, would have a legal claim to these islands. Two objections can be made to this conclusion. First, the Japanese surrender was not a definitive renunciation of the islands but a commitment to renounce them in the Treaty of Peace. In that treaty, signed in San Francisco, September 8, 1951, after the Communist government was in control of China and without the signature of either of the rival governments of China, Japan did "renounce all rights, titles and claims" to these islands, but the beneficiary of this renunciation was not stated.³³ It would appear, therefore, that the claims of the *de facto* occupant, the government of Chiang Kai-Shek, were acquiesced in, perhaps subject to ultimate validation by the Allied Powers with whom Japan concluded the treaty. These 48 states included the United States, the United Kingdom and France but not the Soviet Union or China. No definitive action by the signatory states has been taken, though the United States on December 2, 1954, signed a treaty with the "Republic of China" represented by the Nationalist Government, guaranteeing these islands against attack.³⁴ A note attached to the treaty commits the Government of the "Republic of China" not to "use force" from Formosa, the Pescadores or "the other territory" which it "controls"

modern international law from the natural law of the Middle Ages. The tendency of modern international law to subordinate ideological differences to territorial sovereignty has, however, been influenced by the principles of democratic liberalism, accepted by the United Nations Charter, tending to subordinate territorial sovereignty to human rights. It would appear that international law is in need of a universally acceptable "public philosophy" or "natural law" reconciling the rights of man and the rights of nations. O. Wright, "International Law and Ideologies," 48 A.J.I.L. 619 (1954). See also Walter Lippmann, *The Public Philosophy* (Boston, Little, Brown, 1955); Horace M. Kallen, *Secularism is the Will of God* (New York, Twayne, 1954).

April 28, 1952

without the consent of the United States,³⁵ thus restoring, in some measure, the *de facto* situation of two Chinas implicit in President Truman's orders to the 7th Fleet in June, 1950.

The significance of this treaty is, however, controversial. On the one hand it is said that the designation of the government of Chiang Kai-Shek as the Government of "the Republic of China" means that any hostilities between Formosa and the mainland would have the character of civil strife between the two Chinese factions. Neither could be accused of aggression, since that term in international law implies an international jural frontier, and the matter would presumably be within the domestic jurisdiction of China and outside United Nations control. This position seems to be insisted upon by both the governments claiming to be the government of China. On the other hand it is said that the accompanying note indicates that the term "Republic of China" is a euphemism, and the treaty in fact recognizes that Formosa and the Pescadores constitute a new state separated from China. With this construction an attack by either government upon the other would be an act of aggression. This construction is weakened by the reference to "other territory," apparently referring to the coastal islands, and to the Republic of China's "inherent right of self defense" with respect to "all territory now and hereafter under its control." Secretary Dulles, however, in discussing the treaty at a news conference, explicitly stated that the islands renounced by Japan had a different "juridical status" from the coastal islands.³⁶

A second ground for modifying the inference which the Communist government draws from the Cairo Declaration flows from the provisions of the United Nations Charter recognizing the principle of self-determination of peoples.³⁷ The parties to the Japanese Peace Treaty, most of whom are Members of the United Nations, are free under the Charter, which would legally prevail over the Cairo Declaration,³⁸ to dispose of Formosa and the Pescadores according to the principle of self-determination rather than to restore them to China according to the policy declared at Cairo.

These considerations suggest that there is no principle of international law which would prevent the parties to the Japanese Peace Treaty and the United Nations from recognizing the government of Chiang Kai-Shek as the government of a new state of Formosa and the Pescadores, if by a plebiscite or other means it is found that such a disposition corresponds to the wishes of the inhabitants of these islands.³⁹

tion and *de facto* recognition.) It declared its own independence in 1776 and in 1793 promptly recognized the French Revolutionary Government, although the hands of the latter were still fresh with the blood of Louis XVI, whose aid had contributed to realization of that Declaration. On March 12, 1793, Secretary of State Jefferson wrote to Gouverneur Morris, American Minister in Paris:

We surely cannot deny to any nation that right whereon our own government is founded—that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded.⁴⁰

A month later President Washington submitted to his cabinet the question of receiving Citizen Genet as representative of the new French Republic. Secretaries Hamilton and Knox thought qualifications should be attached to this reception, but Washington received Genet without qualification.⁴¹ In pronouncing the Monroe Doctrine a generation later and in promptly recognizing numerous new states and governments during the next century, the United States combatted efforts to import concepts of the "legitimacy" or constitutionality of internal changes into international law. Revolution was considered a right whose fruits should be recognized when firmly established according to the "will of the nation."

It is true that in the twentieth century there were departures from this principle. Practices of non-recognition were pursued in Central America, Mexico and other Latin American countries to discourage revolution and promote stability. The prolonged non-recognition of the Soviet Government and the Communist government of China were said to be justified by the repudiation or neglect of obligations under international law by those governments. The non-recognition of Manchukuo, of Mussolini's conquest of Ethiopia, of Hitler's conquest of Austria, and of Stalin's conquest of the Baltic states was considered a legal obligation, flowing from commitments to discourage aggression. In other cases, premature recognition, as of Cuba (1898), Panama (1903), Czechoslovakia (1918), and Poland (1918), was justified by doubt whether the *de facto* situation corresponded to the will of the people. In these cases there was also a disposition to intervene to assist the realization of that will. In other cases during the interwar period *de facto* dictatorships were recognized without consideration of popular consent.⁴²

International law tolerates or even requires consideration of circumstances which provide evidence of the probable durability of a government established in fact, but it considers the internal ideology, economy and polity of a government relevant only if they impair its capacity to meet

⁴⁰ 1 Moore, Digest of International Law 120.

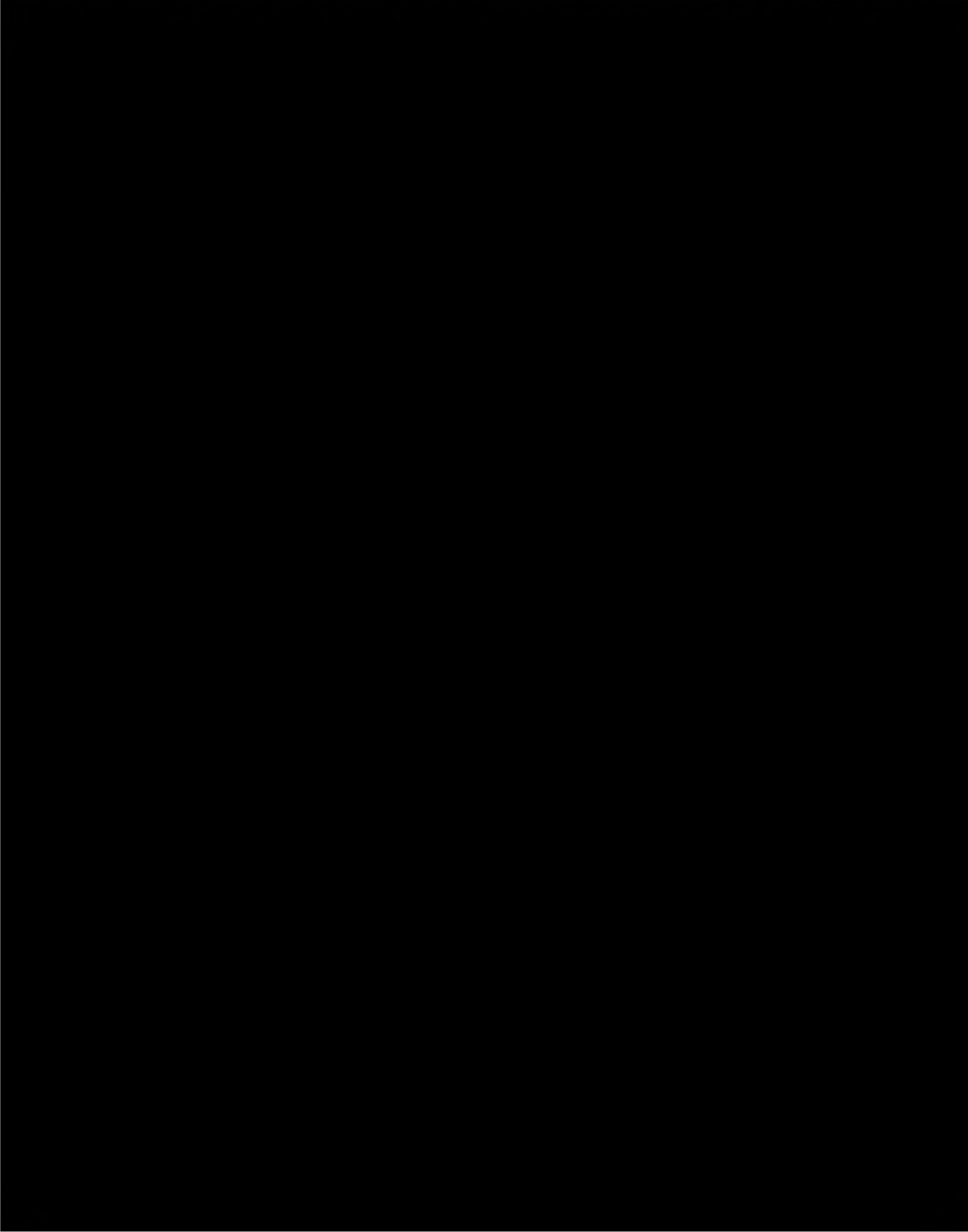
⁴¹ *Ibid.* at 121.

⁴² See Lauterpacht, *Recognition*

93 ff., 124 ff., 416 ff.

international responsibilities.⁴³ To refuse recognition solely because of antipathy to a government's internal practices in these matters constitutes intervention in its domestic jurisdiction. As President Eisenhower said on April 16, 1953:

Any nation's right to a form of government and an economic system of its own choosing is *inalienable*. Any nation's attempt to dictate to other nations their form of government is indefensible.



solicited by the President, run counter to this tradition. Such resolutions, if specific and mandatory, are of doubtful constitutionality and are likely to hamper policies grounded on international law and contributing to national security and international tranquillity.

CONCLUSION

(If we assume) as the available evidence suggests, that the Communist and the Nationalist governments are, respectively, established—the one in mainland China and the other in Formosa and the Pescadores—with sufficient administrative efficiency, public support, and respect for international obligations to make it unlikely that they will be overthrown from internal rebellion or external invasion in any foreseeable future, the following propositions appear to be legal consequences:)

1. The United States is free to recognize the Communist government as the government of China and to do so would be in accord with its traditional policy and the normal expectations of international law.

2. The United States is free to recognize Formosa and the Pescadores as an independent state under the Nationalist Government, and to do so would accord with traditional practice and the principles of the United Nations Charter, provided free and fair elections indicate that an independent state of Formosa under the Nationalist Government conforms to the wishes of the inhabitants.

3. While the United States may not be under a positive obligation to recognize the Communist government as the government of China, that government appears to be the general *de facto* government of China, and as such is alone capable of committing China under international law and alone entitled to represent China in international transactions. It would, therefore, appear that the United States should no longer support the representation of China by the Nationalist Government or oppose its representation by the Communist government in the United Nations and the Specialized Agencies.

4. The United States appears to have recognized the "Nationalist Government" as the government of Formosa and the Pescadores in making a treaty with that state guaranteeing these islands against attack, provided it does not itself launch an attack upon the mainland. It is not believed that the

Formosa and the Pescadores." 32 Dept. of State Bulletin 213 (1955). In an address of Feb. 16, 1955, Secretary of State Dulles said "it is doubtful" whether evacuation of the coastal islands "would serve the cause of peace or the cause of freedom," adding: "The United States has no commitment and no purpose to defend the coastal positions as such. The basic purpose is to assure that Formosa and the Pescadores will not be forcibly taken over by the Chinese Communists." He noted "the strategic linkage of the coastal islands with an attack on Formosa by the Communists," and expressed the hope that even though they maintained their claim to Formosa they might renounce the use of force to achieve it. *Ibid.* at 329 ff.

⁴⁰ Edward S. Corwin, *The President's Control of Foreign Relations* (Princeton, University Press, 1917) 35-82; Wright, *Control of American Foreign Relations* 21-37, 270-273, 278-283; 1 Moore, *Digest* 243-248; 1 Hackworth, *Digest of International Law* 161-166, 313-318; 4 *ibid.* 642-652; 5 *ibid.* 27-29.

United States violated any rule of international law in this action, though it would be desirable to cease referring to this government as the Government of "the Republic of China" and to seek further evidence that the inhabitants of Formosa and the Pescadores approve the establishment of an independent state.

50 While the Communist government can be admitted to represent China through the normal process of accepting the credentials of its delegation in the various organs of the United Nations, it would appear that after such recognition, the government of Formosa and the Pescadores can only be represented in the United Nations if it is admitted as the government of a new state by the normal process. This conforms to the practice in the case of India, whose membership continued in the United Nations after the separation of Pakistan, while the latter was admitted as a new state.⁵⁰

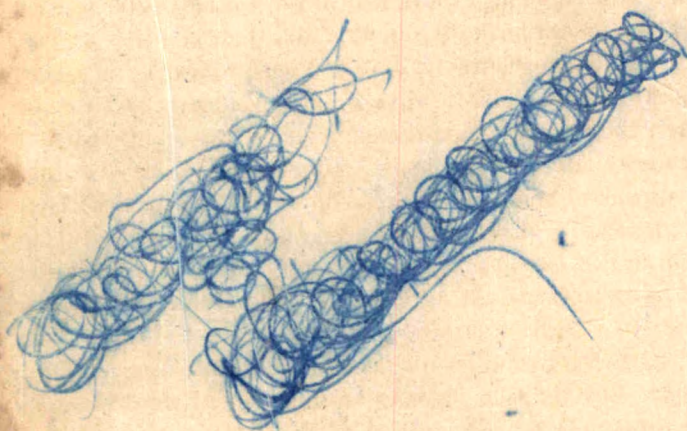
6. The small coastal islands of Quemoy, Matsu, Yinshan, Nanki, Penshan, Tachen, Yikiang and Yushan, have always been considered part of the mainland of China. They were not connected with Formosa and the Pescadores when these were under Japanese rule. Their significance is mainly strategic and they appear to be indefensible from mainland attack without attacks on mainland bases. They should be recognized as pertinent to China and evacuated by Nationalist forces. The agreements of the United States with the Formosa Government appear to give a somewhat qualified recognition of this.⁵¹

While the establishment of an independent state of Formosa in peaceful relations with China seems desirable, it may be some time before political conditions will make possible the recognition of that state by China and the Soviet Union, its admittance to the United Nations, and its renuncia-

⁵⁰ Arthur Dean suggests that even if Communist China is generally recognized, the "Republic of China" on Formosa might be considered the Government of China with title to bank accounts, buildings, and other property of "China" abroad; to the right to protect Chinese nationals abroad; and to China's seat in the Security Council (*loc. cit. supra* note 1, at 373). With due respect, the present writer would suggest that there are limits to jural fictions. *Ex factis jus oritur*. The tail is not the dog. The government of Formosa is not the government of China. While Chinese abroad might, if two Chinese governments are recognized, elect for the nationality of either "Formosa China" or "mainland China"; and while accommodations might be made in respect to properties abroad acquired in the name of Chiang's "Republic of China," only the government which controlled "mainland China" could represent China in the United Nations or other international institutions, or claim title to public property of China abroad not specifically related to Formosa or to Chiang's government. If there are to be "two Chinas," Chinese Formosa would be the new state and the Chinese mainland the old state of China. China was given a permanent seat in the Security Council because it was a state of vast territory, population and potential power. A state of Formosa would have no such claim. During the Bandung Conference Communist China signed a treaty with Indonesia (April 22, 1955) giving Chinese in Indonesia an option to choose Chinese or Indonesian nationality. 24 Far Eastern Survey 75 (May, 1955).

⁵¹ The northern islands—Tachen, Yikiang and Yushan—were evacuated by Nationalist forces in February, 1955, with United States assistance. See address of Adlai E. Stevenson, April 11, 1955, and comments on it by Secretary of State Dulles, April 12, 1955, New York Times, April 12, 13, 1955.

tion of a claim to be the government of China. Political conditions seem more favorable to the general recognition of the Communist government as the government of China and the admittance of its representatives to the organs of the United Nations. Mutual guarantees of non-aggression between China and Formosa might be achieved provisionally even before these states formally recognize each other. A negotiation dealing with all these aspects of the problem might establish a more tranquil situation in the Far East.)



STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW

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During its eighth regular session, the General Assembly of the United Nations considered "that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified." To this end, the Assembly requested the International Law Commission to undertake the codification of these principles.¹ The Tenth Inter-American Conference, held in Caracas March 1-28, 1954, adopted a similar resolution. Considering that "The American Continent has made a notable contribution to the development and to the codification of the principles of international law that govern the responsibility of the State," the Conference resolved to entrust the Inter-American Council of Jurists and its Permanent Commission, the Inter-American Juridical Committee of Rio de Janeiro, with the preparation of a study or report on the subject.²

As is true with respect to other topics of international law, the codification of the principles governing state responsibility is not a task that can be confined today to a mere enumeration and systematization of the various legal rules that theory and practice have established on the subject. It is not difficult to understand why this codification cannot be undertaken as a pure and simple restatement of existing rules. These rules were created and have developed according to some fundamental views and concepts which have undergone a profound transformation in recent

nationals respect for the rules of international law.”⁷ (In consequence of this principle, stateless persons have been deprived of the protection of the rules of “common international law” of aliens, to use the expression devised by the former Permanent Court; despite the fact that they practically possessed that *status* in municipal law. This principle has also given rise to the problems of double or multi-nationality cases. A corollary of the same principle has been that the nature and amount of the reparation claimed have as a rule been determined by the state, not by the individual or legal person injured.)

There would undoubtedly be serious difficulties if an attempt were made to retain this principle and its corollaries, with all their traditional rigidity, in a codification consistent with certain basic postulates of contemporary international law. The international recognition and protection of human rights are facts whose consequences must inevitably affect the right or capacity to bring international claims. Actually, it is very difficult today to maintain the opinion that the state is responsible only with respect to another state; and that in the cases of responsibility for damages to the person or property of aliens there is not a violation of the right of an individual, but merely of the right of the state to insure that such individual be treated in conformity with international law. But in one way or the other, when internationally recognized human rights are at stake, the only and sole possible holder of such rights is the individual because it is precisely to this aim that recognition is granted. In the other hypothesis—such as those of contractual rights—it is only by virtue of a pure fiction, a fiction devised to protect the political prestige and other interests of the state, that one may deny that the true and only subject of those rights is again the individual.

On the other hand, if a solution of the procedural problem of the claim is really (what was) sought, then what should have been done was to recognize in the interested party, in the form and conditions deemed appropriate, a right or procedural remedy. Practice in this respect has been, in a sense, more far-reaching than theory, as is shown by those cases in which an international procedural capacity was granted to private individuals. Reference is made to the *locus standi* which was granted to individuals before the arbitral tribunals set up under Articles 297 and 304 of the Treaty of Versailles, and more particularly to the much more independent position they enjoyed before the Central American Court of Justice and before the Arbitral Tribunal for Upper Silesia set up under the German-Polish Convention of May 15, 1922. The capacity of international civil servants and other persons in respect of the League of Nations and the United Nations Administrative Tribunals are also precedents which are to some extent related to the specific question under discussion. The capacity of the individual directly to acquire international rights, together with the antecedents just mentioned, shows a definite trend of international law, a trend which cannot be ignored when the principles governing state respon-

⁷ P.C.I.J., Ser. A/B, No. 76 (1939) 16.

sibility are codified.⁸ In short, it will, therefore, be necessary to consider thoroughly this extremely important aspect of the subject, to determine what way and on what conditions an individual may be given an international *locus standi* when the effectiveness of the claim so requires.

The question relating to the right to claim damages presents still another problem which should also be taken into consideration when the codification of this aspect of the law of responsibility is undertaken. Reference is now made to the right of some international organizations to assert a claim against a state for damages to the person or property of their officials. The Advisory Opinion of the International Court of Justice, of April 11, 1949, on "Reparation for Injuries Suffered in the Service of the United Nations" is an invaluable contribution to the development of this responsibility, including state responsibility for damage caused to the organization itself.⁹ Indeed, when examining this problem, consideration should also be given to the *status* of the person or entity which rendered the service to the international organization; that is, the right to claim and the procedural capacity to exercise this right.

III. THE "INTERNATIONAL STANDARD OF JUSTICE"

The international recognition of human rights also inevitably affects the "international standard of justice," which is generally accepted by traditional theory and practice as one of the basic criteria for determining the responsibility of the state for injury to aliens. This criterion has frequently clashed with the principle of equality between nationals and aliens which has been confirmed by the national legislation of a large number of countries and has been the subject of various international declarations and conventions. In this connection the Inter-American Conference held in Mexico in 1945, referring to the exercise of diplomatic protection, affirmed that

international protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man.¹⁰

International lawyers have also shared the view that the traditional conceptions must be re-examined in the light of the new approach to human rights. For instance, Professor Jessup has observed that the embodiment in international law of the principle of the duty to respect the rights of man suggests new complications; and that the topic formerly known in

⁸ The subject has been dealt with by many. See, particularly, Flury, *L'accès des particuliers aux tribunaux internationaux* (1932); Schulé, *Le droit d'accès des particuliers aux juridictions internationales* (1934); Kaeckenbeeck, *The International Protection of Upper Silesia* (1942); Hudson, *International Tribunals, Past and Present* (1942), Ch. XIX.

⁹ 1949 I.C.J. Rep. 174; 43 A.J.I.L. 589 (1949). See also the *Oni-Schank* case.

¹⁰ See, e.g., Kerno and A. H. Feller on behalf of the U.N. Secretary General.

¹¹ See I.L.C. on International Protection of the Essential Rights of Man.

international law as "the responsibility of States for injuries to *aliens*" might be transformed into "the responsibility of States for injuries to *individuals*."¹¹

When this other aspect of the law of responsibility is further examined, new shortcomings of the traditional view emerge. As Jessup has also pointed out, numerous grandiloquent statements have been made about the "duty" of a state to protect its nationals abroad, though no such duty is imposed either by international law or, as far as it appears, by national law.¹² As a consequence of this erroneous approach to the problem, not only have stateless persons been deprived of diplomatic protection and serious difficulties arisen in dual or multi-nationality cases, but even the protection of nationals has been subordinated in each particular case to the will and interest of the state rather than to the intrinsic legitimacy of the claim. In short, diplomatic protection has been understood and practiced as a right of the state and, as such, as a faculty which the state exercises at its own discretion. For the individual or the interested party, despite the fact that he is the actual beneficiary of that right, diplomatic protection in reality has been but a mere concession.

One of the fundamental trends of contemporary international law is the protection of the legitimate interests of man. In the performance of this function nationality plays no rôle. This does not necessarily imply that in the future the right of the state to protect its nationals abroad will be ignored; for it is a right the recognition of which will be necessary and proper as long as the organization of the world remains inter-state in nature. What does seem to be beyond question is that nationals of one country will not continue to be protected as aliens in another country, because this protection amounts to an unjustified discrimination with respect to natives and the other individuals who, like stateless persons, are not in a position to enjoy such protection. The solution of this problem perhaps is less difficult than that of the other questions examined heretofore. It might be proper and sufficient to interpret and apply the "international standard of justice" in the light of the (essential) human rights which have been internationally recognized. Actually, it would be very difficult to doubt that the new legal situation in which (essential) human rights and interests are recognized may offer an appropriate solution for the various problems connected with the treatment of aliens by the state. Such a solution, as the Mexico Conference pointed out, would be entirely consistent with the principle of equality between nationals and aliens.

IV. NATURE AND SCOPE OF RESPONSIBILITY

There are still other questions which deserve special attention on the part of the codification bodies. One of them consists in defining the nature of the responsibility which is to be studied. The history of Resolution 799 (VIII), the debates in the Sixth Committee during the eighth session of

¹¹ A Modern Law of Nations (New York, 1948) 97.

¹² *Ibid.* at 97-98.

the General Assembly, and for obvious reasons the Caracas Resolution allow the submission that *criminal* responsibility falls outside of the scope of the codification contemplated in both resolutions. Consequently one may take for granted that the terms of reference include only what may be called—drawing an analogy from the corresponding institution in internal law—*civil* responsibility; *i.e.*, the responsibility incurred by the state through a violation or non-observance of an international obligation, whatever its origin or category, and involving a duty on the part of the state to make reparation. Under the traditional conception, the situation, as to the other questions, was quite simple, since no distinction between the two categories of responsibilities was clearly conceived. To Anzilotti, for instance, international law ignored any opposition between these categories between punishment and reparation.¹³

However, the situation does not appear to be as simple in the present stage of the development of international law. The new concepts of international *criminal* responsibility logically would affect in some way the principles which traditionally have governed *civil* responsibility. In the first place, even though it is not always possible to draw a sharp distinction between criminal acts and the acts or omissions which are simply illegal, in a number of cases a distinction may be drawn without any difficulty. For example, the denial of justice in general or the non-observance of contracts between the state and a natural or juridical foreign person constitute illegal acts or omissions that are contrary to international law without involving any criminal responsibility. Conversely, certain violations of essential human rights (genocide, crimes against humanity, etc.) in addition to being illegal acts, also involve the international criminal responsibility of the state. In both hypotheses a claim for damages is in order, but the gravity of each category of acts or omissions certainly will have some influence when reparation is to be determined. In connection with the same aspect of the question, consideration should also be given to the circumstance that some of the acts or omissions which under traditional international law were purely and simply illegal acts or omissions, in contemporary law have become criminal in character. This circumstance, in turn, increases the importance of determining and distinguishing the various categories of acts or omissions which may be the origin of international responsibility.

The same question has another aspect which likewise should not be overlooked. As it has been pointed out, in contemporary international law the individual has become a direct subject—sometimes the only subject—of some international obligations. This has occurred particularly in the criminal field. According to the most far-reaching view, which has been incorporated in the Genocide Convention and the Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission, the individual is the sole responsible subject for the commission of international crimes.¹⁴ According to a second school of thought

¹³ *Opuscoli di Diritto Internazionale* (3rd ed., Rome, 1928) 117.

¹⁴ Report of the International Law Commission Covering the Work of 1951, *Ann. Y.B. Int'l L. Comm.*, Vol. 2 (July 28, 1951) (Doc. A/2693), Ch. III; 49 A.J.I.L. Supp. 17 (1955).

specially represented by Saldaña and Pella, the state is in certain cases the responsible subject. A third view is held by Professor Dautricourt, who believes that whenever an international crime is committed the individual is the subject of the criminal responsibility, while civil responsibility should be attributed to the state.¹⁵ These differences of opinion show the complexity of the problem. But there is no doubt that the problem should be given an adequate and practical solution. And no solution will be possible until the various international crimes are examined with a view to determine and allocate the (different) responsibilities in conformity with the new trends of international law.

In addition to the question discussed in the foregoing paragraph, there is still another which more directly affects the *civil* responsibility of the state. Reference is made now to the fact that contemporary international law has imposed new obligations upon the state, and, on the other hand, it has defined others which in traditional law were not sufficiently defined to attribute without difficulty to the state the responsibility for their fulfilment. In this connection one need only refer to such constitutional instruments as the Charter of the United Nations and the Charter of the Organization of American States. In consequence of this fact, it is reasonable to suppose that there has been a broadening of the nature and number of acts or omissions which make the state internationally responsible. There is no need to emphasize the importance of examining this question. The codification bodies cannot successfully codify the principles of international law governing the subject-matter if they fail to examine the traditional law in the light of the obligations which such instruments, as well as other sources of contemporary law, impose upon the state today.

Both the General Assembly and Caracas resolutions specifically refer to the *codification* of the principles of international law governing state responsibility. Aside from the differences that exist at the present time with respect to the procedure or method of work, be it "development" or "codification" of a given subject, the international bodies entrusted with the performance of both functions generally perform the task of *codification* according to a very liberal interpretation of this term. The codification of the law of "state responsibility" certainly constitutes one of the subjects of international law in which such interpretation is more needed and justified. A pure or strict codification of the principles and rules which traditionally have governed the responsibility cases would not fulfill satisfactorily the aims sought when this codification was requested; namely, the "maintenance and development of peaceful relations among States." It is necessary to "codify" something else. In effect, it is necessary to introduce in the traditional law other changes that might have been determined by the profound transformation undergone by international law. It will be necessary at least to accept some innovations where experience has shown that traditional principles and rules have not fulfilled adequately the function of law in international relations.

¹⁵ For a summary of these different views on the subject of international criminal responsibility, see Memorandum prepared by the late Professor Vespasien Pella and published by the U.N. Secretariat (Doc. A/CN. 4/39), pp. 102-125.

SOME RECENT FRENCH DECISIONS ON THE RELATIONSHIP BETWEEN TREATIES AND MUNICIPAL LAW

BY LOUIS C. BIAL
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The relationship between treaties and municipal law has been widely discussed in this country in recent years. The discussion, however, has been limited to the problems raised by the proposed Constitutional amendments.¹ Thus, the possibility of a conflict between the Constitution and a treaty, or between a treaty and State law, has been debated, while the possibility of a conflict between a treaty and a Federal statute has been hardly ever mentioned.

(The classical solution of such a conflict is in favor of the *lex posterior*, i.e., treaties and Acts of Congress are of equal rank, the more recent abolishing and superseding the older one.²) The fact that this solution was not attacked during the long debate on the Bricker Amendment seems to indicate that (American jurists are satisfied with it.)

(This is, however, not the case in a number of European countries, where it is felt that international law should take precedence over municipal law.) This idea has become constitutional law in the leading Continental states, such as France,³ Italy,⁴ the Federal Republic of Germany,⁵ and The Netherlands.⁶ The French Constitution of 1946 contains the following provisions:

Art. 26. Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification. ✓

¹ Whitton and Fowler, "Bricker Amendment—Fallacies and Dangers," 48 A.J.I.L. 23 ff. (1954); Sutherland, "The Bricker Amendment, Executive Agreements, and Imported Potatoes," 67 Harv.L.Rev. 281 (1953); Preuss, "On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties," 51 Mich.L.Rev. 1117 (1953); Perlman, "On Amending the Treaty Power," 52 Col.L.Rev. 825 (1952), and many others.

² The Cherokee Tobacco, 78 U. S. 616 (1870); Head Money Cases, 112 U. S. 580 (1884); Potter, "International and National Law in the United States," 19 A.J.I.L. 315 ff. (1925); Corwin, The Constitution of the United States, Analysis and Interpretation (1953) 420 ff.

³ Constitution of the French Republic, 2 Peaslee, Constitutions of Nations (1950) 8, Arts. 26 ff.

⁴ Constitution of the Italian Republic, 2 Peaslee, *op. cit.* at 279, Art. 10.

⁵ Basic Law of the Federal Republic of Germany, 3 Peaslee, *op. cit.* at 599, Art. 25. The Bundesgerichtshof (Supreme Federal Court) has held in a decision of March 3, 1954, Neue Juristische Wochenschrift (1954) 1050, that this provision applies to treaty obligations.

⁶ Constitution of the Kingdom of The Netherlands, as amended June 22, 1953, Art. 67, quoted in Van Panhuys, "The Netherlands Constitution and International Law," 47 A.J.I.L. 537, 540 (1953).

Art. 28. Since diplomatic treaties duly ratified and published have authority superior to that of French internal legislation, their provisions shall not be abrogated, modified, or superseded without previous formal denunciation through diplomatic channels.⁷

These provisions, of which French lawyers are proud,⁸ have been discussed in this JOURNAL by Preuss.⁹ There were at that time only a few court decisions applying the new constitutional law. In recent years, however, so many decisions on the subject have been handed down, that it is impossible to report on all of them in this note. We must, therefore, limit this report to a series of cases dealing with the relationship between a certain type of treaty and a certain type of municipal law.¹⁰

In the cases which we consider, the superiority of treaties over municipal law was invoked by aliens who claimed violation of their treaty rights by laws or decrees imposing duties upon aliens allegedly incompatible with the terms of such treaties. The treaty most often relied upon was the Franco-Spanish Consular Convention of January 7, 1862.¹¹ It contains a provision to the effect that citizens of one contracting party, authorized to reside in the territory of the other contracting party, may engage therein in any kind of industry or commerce, paying the taxes and duties and observing the laws and regulations in force for nationals.

On the other hand, a French decree-law of November 12, 1938,¹² provides that aliens may not engage in a commercial or industrial profession in France unless they have first obtained from the Prefect of the *département* in which they intend to engage in such activity a special identity card called "*carte de commerçant*," and imposes penalties for engaging in such activity without the prescribed card. The issue raised was whether these provisions are applicable to aliens entitled to the benefits of the Franco-Spanish Convention or similar treaties, or to aliens assimilated to the former by a most-favored-nation clause.¹³

⁷ Translation from 2 Peaslee, *op. cit. supra* note 3, at 12. These provisions have inspired the similar provisions of Art. 64 of the Syrian Constitution, enacted in 1953. See Tarazi, "La supériorité du traité sur la loi dans la nouvelle Constitution syrienne," 3 *Revue de Droit Int. pour le Moyen-Orient* 176 (1954).

⁸ Mirkine-Guetzévich, *Les Constitutions Européennes* (1951) 118.

⁹ "The Relation of International Law to Internal Law in the French Constitutional System," 44 *A.J.I.L.* 641 (1950). See also Rice, "The Position of International Treaties in Swiss Law," 46 *ibid.* 641 (1952).

¹⁰ These cases are believed to be representative of some of the problems which arose in connection with the new constitutional provisions relating to treaties. There are many other cases in which the relationship between treaties and municipal law was in issue; these, and other French cases relating to public international law, must be left to subsequent studies.

¹¹ 8 *De Clercq, Recueil des Traités de la France* 374; 52 *British and Foreign State Papers* 139.

¹² J. O. 1938.12923, Duvergier, *Lois et décrets*, N. S. 38.1022. Cf. 2 Niboyet, *Traité de droit international privé français* 172 ff. (2d ed. 1951), on history and interpretation of this statute.

¹³ See, for a list of such treaties, Freyria, 41 *Rev. crit. Droit int. privé* 482 (1952). The Consular Convention between the United States and France, signed at Washington on Feb. 23, 1853, also contains a clause assimilating citizens of one party to nationals of the other party.

The first three cases dealing with this matter were those of *Coll*,¹⁷ a second *Coll* case¹⁸ and *Sanchez*.¹⁹ In each of these cases, the defendant contended that the decree-law of 1938 was not applicable to him as a Spanish citizen by virtue of the 1862 Convention. In the first *Coll* case this contention was rejected. In the second *Coll* case, the court held that the treaty does not free Spanish citizens from the requirement of the "*carte de commerçant*," but that it makes the delivery of the card obligatory. In the *Sanchez* case, the court, relying on Articles 26 and 28 of the Constitution, held that the 1938 decree-law was incompatible with the 1862 Convention and that defendant, therefore, was not required to obtain a "*carte de commerçant*."

These cases, offering three different solutions of the same problem aroused considerable interest in France. Jacques Benoist²⁰ and Charles Freyria²¹ commented on all three cases, the latter including in his review two further cases which adopted the views of the *Sanchez* case: those of *Moyot*²² and *Orbeck and Roby*.²³ Both commentators strongly criticized the decision in the first *Coll* case for giving municipal law precedence over a treaty in violation of the Constitution. The decision in the second *Coll* case was condemned for being unrealistic: If the Administration is compelled to deliver the card in any event, the institution can no longer serve its only purpose, namely, to exclude aliens from engaging in commerce where such exclusion is deemed to be in the public interest. On the other hand, the decision in the *Sanchez* case and the cases following it were generally approved.²⁴

Freyria²⁵ raised, however, the following question: If the court holds that a statute is invalid because it violates a treaty, does it not thereby find that such statute is unconstitutional, since it is the Constitution which

¹⁷ Cour de Paris, 13th ch. corr., Jan. 29, 1951, Juris-Classeur Périodique (La semaine juridique) hereinafter referred to as J.C.P.), 1952.II.7056.

¹⁸ Cour de Paris, 16th ch. corr., Jan. 24, 1952, *ibid.*

¹⁹ Cour de Lyon, 4th ch. corr., Feb. 16, 1952, J.C.P.1952.II. 6996.

²⁰ Comments in J.C.P.1952.II.6996 and 7056.

²¹ 41 Rev. crit. Droit int. privé 475 (1952).

²² Trib. corr. Seine, 12th ch.bis, May 9, 1952, J.C.P.1952.II.7130, Gazette du Palais (hereafter referred to as Gaz. Pal.) 1952.242.

²³ Trib. corr. Seine, 17th ch., May 9, 1952, 41 Rev. crit. Droit int. privé 474 (1952). Orbeck was not a Spanish citizen, but a Dane. He relied upon the Additional Article to the Franco-Danish Convention of 1842, of Feb. 9, 1910 (6 Nouv. Rev. Gén. des Droits (3rd ser.) 889), Art. 1 of which provides that Danish subjects in France and French citizens in Denmark shall enjoy with regard to the exercise of trades and professions the same rights, privileges, liberties, favors, immunities, and exemptions as are or will be accorded nationals.

²⁴ In addition to Benoist, note 17 *supra*, and Freyria, note 18 *supra*, see Chénier, *rev.*, Recueil Dalloz (hereinafter referred to as D.) 1952.J.801; Savatier, "A propos des cartes de commerçant: les traités d'établissement et l'individualisation des citoyens étrangers," D.1953.Ch.21; Sarraute & Tager, Droit international privé (1953), C. 1954, March 5, 9, 12 and 16; Loussouarn, 5 Revue Trimestrielle de Droit Comparé (hereinafter referred to as Rev.Trim.Droit Com.) 677 and 699 (1952), 6 Rev. 780 (1953); Sialelli, Survey of French Judicial Decisions, 79 Louisiana Law Review 874 (1952), 80 *ibid.* 431 (1953); Clunet 874 (1952), 80 *ibid.* 431 (1953).

imposes the supremacy of treaties, and is it not prohibited to French courts, through long judicial tradition, to refuse the application of a statute on the ground that it violates the Constitution, as long as such statute has been adopted and promulgated in accordance with the formal requirements established by the Constitution? Freyria believes that the problem can be avoided in this instance by reading into the decree-law of 1938 an exemption in favor of aliens assimilated to nationals by treaty. His view is that Article 26 is a mandate addressed to the courts to read such exception into every statute that otherwise would violate a treaty. Only where an express provision in a statute makes such an interpretation impossible, does the problem of constitutional control of the legislator by the judiciary arise.

The decision of the Cour de Lyon in the *Sanchez* case was followed in that of *Cot*,²³ affirmed by the Cour de Riom,²⁴ and of *Ortiz*.²⁵ In the case of *Sastella*,²⁶ the same rule was applied to a Swiss citizen. In *Madrid et dame Gratte*,²⁷ however, the court held that the 1862 Convention assimilated Spanish citizens to French nationals only in the fields of civil, commercial, and tax law, but not with respect to the laws of police, and defendant was convicted for having engaged in commerce without first having obtained a "*carte de commerçant*."

Faced with this abundance of contradictory views, French lawyers were eager to hear the voice of France's Supreme Court, the Cour de Cassation, whose function it is to assure the unity of French law. Three cases came up before the highest court and were decided on the same day by the criminal division of the Court. One was an appeal from the decision of the Cour de Lyon in the *Sanchez* case,²⁸ the other two cases, *Ara-Arroyos* and *Bruni et Dlle. Galtier*, were appeals from the Cours de Pau and Riom, respectively.²⁹

The Court's attitude was completely different from that taken by the lower courts. While the latter had attempted to ascertain whether or not the decree-law of 1938 violated the 1862 Convention or similar treaties, the Cour de Cassation held that it was not for the courts to interpret a treaty, but that they should have stayed the proceedings and requested the Minister of Foreign Affairs to advise them whether the 1862 Convention authorized Spanish citizens to engage in commerce in France without being in possession of a "*carte de commerçant*," and whether French citizens enjoy reciprocal rights in Spain. The decisions below were reversed,

²³ Trib. corr. Montluçon, July 17, 1952, J.C.P.1952.II.7292.

²⁴ Dec. 11, 1952, J.C.P.1953.II.7379.

²⁵ Trib.corr. St.Nazaire, Nov. 6, 1952, Gaz.Pal.1953.1.23.

²⁶ Trib. corr. Seine, Dec. 20, 1952, Gaz.Pal.1953.1.144, aff'd. Cour de Paris, 13th ch. corr., 2d sec., April 1, 1954, Gaz. Pal. 1954, May 15-18, discussed *infra*. Defendant relied on the Franco-Swiss Treaty of Establishment of Feb. 23, 1882 (9 Nouv.Rec.Gén. des Traités (2d ser.) 95), which is a treaty of assimilation (Arts. 1 and 3), and also contains a most-favored-nation clause (Art. 6).

²⁷ Trib. corr. Seine, March 11, 1953, Gaz.Pal.1953.1.248.

²⁸ Note 16 *supra*.

²⁹ Cass. crim., March 24, 1953, J.C.P.1953.II.7659, 80 Clunet 645 (1953).

whether the defendant had been convicted or acquitted, and the cases remanded to permit the courts below to obtain the necessary advice of the executive branch of the government. ✓

The decisions of the Cour de Cassation are of the usual brevity. The sentence, contained only in the opinion in the *Bruni* case, that

international conventions are acts of high administration which can, if necessary, be interpreted only by the powers between whom they were concluded

is all the reasoning offered by the Court. ✓

The commentators on this decision³⁰ have not failed to point out that the absolute prohibition of any interpretation of a treaty which the Court seems to pronounce is inconsistent with the formula used by the *Chambres Réunies* in *Consorts Friedmann v. Min. Publ.*³¹ There, the court had said that:

if the interpretation of a diplomatic treaty raises, as in this case, questions relating to the international public order, the courts must adopt the official interpretation, as stated by the French Government.

Under this formula, French courts must follow the interpretation of a treaty by the executive branch only if questions of public international law are to be decided. Also, in *Gambino v. Arcens*,³² the *Assemblée Plénière Civile* had not hesitated to interpret a treaty by holding, without referring to the Minister of Foreign Affairs, that an agreement entered into by an exchange of letters between France and Italy of May 17, 1946, and ratified by a decree issued and published in 1949, did not entitle Italians to claim certain rights under a special statute relating to agricultural leases. It was therefore felt that, had the three cases come before another division of the *Cour de Cassation*, the decision might have been different.

Even more strongly criticized than the part of the decision which denies the power of the courts to interpret treaties, was the part which directs the courts below to inquire of the government whether there is reciprocity. Here, the court seemed to overlook the fact that the Franco-Spanish Convention is not a treaty of reciprocity, but of assimilation.

The highest court having spoken, it remained to be seen how the government would interpret the Franco-Spanish and other treaties, and whether the lower courts would accept the views of the *Cour de Cassation*, since the doctrine of *stare decisis* is not recognized in France. ✓

The Minister of Foreign Affairs, in a letter of June 18, 1953, stated that Spanish citizens may, under the Franco-Spanish Convention of 1862, claim in France national treatment for the exercise of a commercial profession,

³⁰ Note in *Gaz. Pal.* 1953.I.332; Weill and Leauté, *J.C.P.* 1953.II.7659; Brouchet, 42 *Rev. crit. Droit int. privé* 573 (1953).

³¹ *Chambres réunies*, April 27, 1950, *D.* 1950.J.379. On the position of the *Conseil d'Etat*, highest French administrative court, see Virally, "Le *Conseil d'Etat* et les traités internationaux," *J.C.P.* 1953.I.1098.

³² *Assemblée plénière civile*, March 11, 1953, *J.C.P.* 1953.II.7673, note by Ourliac and de Juglart.

but nevertheless cannot therefore escape the measures of control which the state of their residence deems necessary to take with respect to aliens for reasons of public order. He also stated that this principle is generally accepted in Spain, where such controls are in force.

While this statement is certainly not very clear, it was understood by three appellate courts to mean that the 1862 Convention and similar treaties do not free the aliens favored by them from the requirement of the *carte de commerçant*. In the cases of *Carillo-Frontello*,³³ and *Jimenez*,³⁴ the court held that the decree-law of 1938 did not violate the Franco-Spanish Convention of 1862, and convicted the defendant accordingly. In *Bruni et Dlle. Galtier*,³⁵ one of the three cases previously decided by the Cour de Cassation and remanded to the Cour de Limoges, that court also affirmed defendant's conviction, stating as follows:

It is settled case law that if a question of public international law is involved, the courts must conform to the official interpretation as stated by the French Government (Ch. réunies, 27 April 1950, JCP.1950.5650). The judgment of the Cour de Cassation, remanding the case at bar to this Court, is but an application of this case law established in the judgment of April, 1950. In this case, the statute involved is a text of public order by reason of its regulatory and penal character; it is also of international character, because it deals with a question concerning aliens residing or domiciled in France.

It will be noted that, while obeying the mandate of the Criminal Division, the Court bases its decision expressly on the formula adopted by the Chambres Réunies, attempting to reconcile the two decisions by holding that the case at bar concerns a question of public international law and is therefore covered by the formula of the Chambres Réunies.³⁶

But on April 1, 1954, the Second Section of the same 13th Chamber of the Cour de Paris whose First Section had, a few weeks earlier, in the *Carillo-Frontello* case,³⁷ held that Spanish citizens must have a "*carte de commerçant*," handed down three decisions to the contrary in the cases of *Vallès*,³⁸ *Hurtado*,³⁹ and *Sastella*.⁴⁰ In the opinion, the court stated:

It is sufficient to refer to the text of the Consular Convention of January 7, 1862, which has been ratified and promulgated and the terms of which are not ambiguous, in order to agree, without fearing a mistake, that this treaty is, indeed, a treaty of assimilation and not of reciprocity. In an official letter of July 22, 1929, addressed to the Attorney General and published in the Official Gazette of August

³³ Cour de Paris, 13th ch.corr., 1st sec., March 2, 1954, J.C.P.1954.II.8070, Gaz.Pal. 1954, May 15-18.

³⁴ Cour de Toulouse, May 21, 1954, D.1954.J.446.

³⁵ Cour de Limoges, Nov. 19, 1953, Gaz.Pal.1954, April 14-16; see comments by Sialelli in 81 Clunet 114 (1954).

³⁶ A recent case employing the same formula is Procureur Général Cour Cassation, Cass.civ. July 6, 1954, J.C.P. 1954.IV.123.

³⁷ Note 33 *supra*.

³⁸ D.1954.J.280.

³⁹ Gaz.Pal.1954, May 15-18.

⁴⁰ *Ibid.*

12, 13, 1929, the then Minister of Foreign Affairs expressly recognized that the Franco-Spanish Convention of January 7, 1862, was one of the conventions containing the clause of assimilation to national

From the foregoing, the court concludes that Spanish citizens residing in France are not required to obtain a "*carte de commerçant*." It comes to the fact that such card is issued only after the Chamber of Commerce and other professional organizations have been consulted, that it is valid only in a certain area and for a definite profession, and that it is within the discretion of the administrative authorities to grant or refuse it.

is obviously incompatible with the regime of assimilation established by the 1862 Convention. The court then holds as follows:

In the presence of two contradictory texts, one of municipal law, the other of a diplomatic character, the latter is the superior law under Art. 26 of the Constitution of the French Republic of October 2, 1946. ~.

The court then refers to the decision of the Cour de Cassation of March 24, 1953,⁴¹ and the letter of the Minister of Foreign Affairs of June 18, 1953, and comes to the conclusion that the letter is not clear and does not expressly state whether or not Spanish citizens must comply with the 1862 decree-law. The conflict must therefore be resolved in favor of the treaty which is the higher law, there being no evidence that it has been terminated by denunciation as provided in Article 28 of the Constitution.

This decision shows that the dispute about the requirement of the "*carte de commerçant*" for aliens covered by assimilation treaties is not yet settled. It seems, however, possible to draw a few general conclusions from the cases here discussed:

1. The superiority of treaties over municipal law is, in itself, not in doubt. The rule is applied to all treaties, whether concluded prior to or after the enactment of the Constitution.⁴² The date of enactment of the statute violating the treaty or inconsistent with it is equally irrelevant.

2. As in the United States, French courts tend to reconcile treaties and statutes by narrow interpretation of either one or the other. ~

3. It is generally admitted that in matters of public international law the courts must accept the interpretation of the executive branch, if there is one, or seek it, if there is none. It is doubtful whether the decision of the Cour de Cassation in the *Sanchez, Ara*, and *Bruni* cases⁴³ was intended to go beyond this rule by requiring governmental interpretation even in matters of private law.

4. The necessity of obtaining the advice of the executive branch raises a number of other questions:

⁴¹ Note 29 *supra*.

⁴² For a recent application of the principle see Allgater, Cass. crim., June 29, 1951, JCP.1954.IV.119, where the court refused application of Art. 192 of the Code of Military Justice because it violates the Geneva Convention on Prisoners of War of July 27, 1929. The court expressly stated as its *ratio decidendi* that the Convention is the superior law under Art. 28 of the Constitution.

⁴³ Note 29 *supra*.

(a) Is such inquiry necessary whenever a party before the court argues that the treaty is ambiguous, or will the court first decide whether there is in fact an ambiguity and require the advice of the government only if it finds that the treaty is ambiguous? It cannot be denied that the decision whether or not an ambiguity exists is already an interpretation of the treaty, which, if the courts have no power of interpretation, must logically be left to the executive branch. On the other hand, if there is really no ambiguity, the government should not be permitted to interfere with the correct interpretation. This seems to be the view of the Cour de Paris in the most recent cases,⁴⁴ since it stresses the fact that, in its opinion, the 1862 Convention is not ambiguous and therefore needs no interpretation.

(b) May courts adopt the view of the executive branch expressed in an earlier case, or is it necessary to obtain new advice in each case? In the *Vallès* and parallel cases,⁴⁵ the court relied upon an interpretation of the Franco-Spanish Convention by the Minister of Foreign Affairs in 1929. But in spite of the existence of this interpretation, the Cour de Cassation had in the *Sanchez* and parallel cases⁴⁶ reversed and remanded for the purpose of obtaining a new interpretation. Was this because the 1938 decree-law was not yet in existence in 1929? Or was it necessary to obtain a new opinion because the Minister of Foreign Affairs in 1953 was not the same as in 1929? Or was it just felt that the 1929 opinion was too old to be relied upon? These questions remain to be answered.

(c) If the governmental view is mandatory in questions of public international law, but not in matters of private law or public internal law, it becomes necessary to define the limits of these areas. This is not always easy. A law of police like the 1938 decree-law is, of course, public law, but is it public international law? In the *Bruni* case,⁴⁷ the Cour de Limoges attempts to prove that the 1938 statute is not only of public, but also of international character, because it concerns the rights of aliens. It is true that the protection of aliens is an important subject of public international law, but it is equally certain that national laws concerning aliens are municipal and not international law. It might be argued that the court was called upon to apply a treaty, *i.e.*, international law, and that therefore it had to decide a question of public international law. This is, however, equally true if the courts have to interpret a treaty in a purely private law matter, and it is settled case law that in that case the courts have the right and duty to interpret the treaty without looking to the executive branch.⁴⁸ Thus, it seems that the true criterion is whether or not the municipal law with which the treaty is in conflict is public or private law. In the former case, the courts must request the interpretation of the treaty by the government, with possibly two exceptions: (i) if the

⁴⁴ Notes 38, 39 and 40 *supra*. See also: *Capello v. Marie*, Cass.civ. Feb. 10, 1948, Recueil Sirey 1948.I.94, Annual Digest 1948, Case No. 112, p. 327.

⁴⁵ Notes 38, 39 and 40 *supra*.

⁴⁶ Note 29 *supra*.

⁴⁷ Note 35 *supra*.

⁴⁸ Cases cited in notes 31 and 32 *supra*.

2. Mrs. Seery's property is "enemy property" under international law, subject to temporary appropriation and use by the occupying Power. Citing the various quadripartite and American statements regarding the legal status of Austria and considering the circumstances of the taking in 1945 after military necessity had disappeared, the Court found against any customary international law authorization for the taking by the American military authorities. Austria was not, in any event, "enemy territory" at the time of the taking.

3. The United States is not liable to Mrs. Seery, because by an executive agreement between the United States High Commissioner in Austria and the Chancellor of the Federal Government of Austria of June 21, 1947, Austria assumed to settle all claims of all persons owning property in Austria for losses caused by the United States Forces for and in consideration of the transfer by the United States to Austria of one-third of a billion schillings.

The Government relied on the *Pink, Belmont and Altman* cases to support its position as to the effect of the executive agreement, and Mrs. Seery cited the usual authorities for the proposition that even a "formally ratified" treaty cannot accomplish what the Constitution forbids.

In its decision the Court of Claims carefully skirted between the absolutes argued. It accepted the viewpoint, supported by a Court of Claims decision, that a "formally ratified" treaty assigning liabilities elsewhere, being legislation, amounted to a withdrawal by Congress of consent to be sued. On the other hand, an executive agreement, similar in purpose, not being legislation, could not have the effect of withdrawing Congress' grant of consent to such suits in the Court of Claims. The Court said:

. . . It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress, consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen. In . . . *Capps* . . . the Court held that an executive agreement which conflicted with an Act of Congress was invalid.

The report of the *Seery* case does not show whether the plaintiff made any effort to collect from the Austrian Government for the damage to her property. It is stated that she filed a claim with the Department of Defense and thereafter brought this action against the United States. Thus, the case will be seen as one having serious implications for all those occupied and liberated area settlements wherein some other country has agreed to accept liability for losses occasioned as a result of the actions of American Forces. There is no reason to suppose that only American citizens may bring such actions.⁷

Admitting *arguendo* that occupation arrangements for the assumption of liability were designed primarily for dealing with the claims of the local

⁷ The cases in note 4 *supra* apparently did not involve either citizens or residents of the United States. Moreover, the Fifth Amendment is not limited to citizens but covers persons subject to the jurisdiction of the United States. *Quaere*: including those in occupied areas?

populace in the occupied area, we should not lose sight of the fact that if the plaintiff wins this case she will be getting compensation in hard dollars for an investment most likely made originally in other currency now depreciated and subject to currency control, but probably adequate to put her property back into its pre-officers' club condition. This consideration leads us on to another situation where this decision may be the source of difficulty: lump-sum nationalization settlements. Under the American contention that international customary law requires prompt, adequate and effective compensation for an alien's property taken into public ownership, compensation in non-convertible local currency has presented a particular difficulty. This difficulty has been resolved in several instances—of which the United States-Yugoslav Nationalization Settlement of July 19, 1948, is typical—by a lump-sum settlement. Under such a settlement a reasonably negotiable figure in dollars is accepted by the United States in full satisfaction of the totality of claims against the nationalizing country, and the particular American claimants are therefore relegated to making their claims *pro tanto* against the lump sum. The lump-sum settlement is by an executive agreement.⁸ The effect of the agreement is to cut off the owner from effective legal action in the nationalizing country; internationally, also, the United States can no longer press his claim. He must look to his share in the salvage transaction, the lump-sum settlement.

Let us suppose a case: An American company in 1940 invested a million dollars in a plant in Country X. Eighty other Americans, naturalized after their original investment, but before the taking, used other currencies now greatly depreciated and subject to exchange restrictions, in acquiring property in Country X. All private property in X is nationalized. In order to get dollars now for all the claimants, a lump-sum settlement of \$17,000,000 is accepted as against total reported claims of \$50,000,000. A fair ratio of recovery out of this sum for the company is \$500,000.

If the United States had done nothing, there would clearly have been no taking on the part of the United States, it seems certain. If it does act, we should not expect that due process problems could be avoided by the simple expedient of adverting to the old dogma that the international reclamation is the sovereign's cause of action, not the individual's. Despite this theory, the fact remains that something is being done by executive agreement to diminish or change the citizen's legal relationship to property.

This brings us back to the *Seery* case. What "taking" does the Court have in mind there? The original "liberations" by the careless or light-fingered Army officers, or the executive agreement's shifting of responsibility to Austria? It is not easy to answer this question from the *Seery* case. At best we can distinguish the two situations on the ground that in the *Seery* case agencies of the United States had taken "property" (in the sense of the material things) and thereafter the executive agreement had

⁸ It may, however, be in effect ratified by Congress as was the case of the Yugoslav Agreement under the International Claims Settlement Act of 1949 (81st Cong., 1st Sess., 64 Stat. 12).

purported to take away a Congress-granted cause of action, whereas, in the nationalization case supposed, the United States through the executive agreement does not take away any material thing—the other country did that. However, in the hypothetical case “property” has certainly been affected by the executive agreement. It is submitted, however, that the distinction is entirely valid and should be made.

More broadly viewed, the *Seery* decision is interesting as another indication from the courts that Senate-consented treaties, “congressional-executive” and “presidential” agreements are not, after all, absolutely interchangeable instruments of national policy.⁹ It is the “presidential” or executive agreement that has suffered a loss of face in these decisions. Whereas it still seems to be assumed that treaties are valid unless they violate some specific prohibition of the Constitution, and even though it is arguable that an executive agreement might extend Congress’ power to implement it, the purely executive agreement will fail if it contradicts specifically a prior statute, *Capps* case, or if it departs from what the court interprets as the general intent of a prior statute, *Seery* case. The difference can be seen by making one further supposition: An Austrian state treaty, so long delayed, has been signed recently. Suppose that treaty reaffirms the principle of the executive agreement involved in the *Seery* case and the treaty goes into effect after Senate consent. Thereafter another American national or resident alien or non-Austrian anywhere sues in the Court of Claims for an injury to his property in Austria while in the hands of United States agencies. What result? The *Seery* case *dictum* would compel an answer opposite to the holding there.

Perhaps the difference is entirely justified and in fact wise if limited to situations where the original taking is attributable on agency principles to the United States. It is only to be hoped that in the course of the process of judicial inclusion and exclusion with regard to executive agreements, Senator Bricker’s new assumption that all executive agreements of all types are so clearly subject to the power of Congress to regulate under the “necessary and proper” clause of Article I of the Constitution as to need no specific coverage in his new proposal for amending the treaty power,¹⁰ does not gain so much ground with the judiciary as to deny to the President and his executive agents the power to give course and direction to American foreign policy.

It is not likely, however, that the cohorts of the Bricker Amendment, Mark II, will let lie the Court of Claim’s intimation that “formal treaties” may take property without compensation. The negative pregnant will be no obstacle, we may be assured, to those who have flogged dead decisions, such as the California intermediate appellate court opinion in the *Sei Fujii*

⁹ Cf. Myres S. McDougal and Asher Lane, “Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,” 54 Yale L.J. 186-189 (1945).

¹⁰ Consult Craig Mathews, “The Constitutional Power of the President to Conclude International Agreements,” 64 *ibid. passim* and 387 (1955).

case, an opinion which in California appellate theory ceased to exist¹¹ when the Supreme Court of the State took jurisdiction and wrote an opinion basing invalidity on the Fourteenth Amendment, rather than on the general language of the United Nations Charter and the goals (not norms) of the Universal Declaration of Human Rights.

COVEY T. OLIVER

"TREATY-INVESTOR" CLAUSES IN COMMERCIAL TREATIES OF THE UNITED STATES

The entry of aliens into the United States is the subject of very limited provisions of commercial treaties. Congressional power has, however, found expression in certain legislative provisions establishing permissive bases for useful clauses in such treaties. A recent example of this is that part of the Immigration and Nationality Act of 1952,¹ which excepts from the category of immigrant (for the purposes of the Act):

an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign country of which he is a national, and the spouse and children of any such alien if accompanying or following to join him (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital. . . .²

Three recently signed commercial treaties of the United States (that with Japan, signed April 2, 1953,³ that with the Federal Republic of Germany, signed October 29, 1954,⁴ and that with the Republic of Haiti, signed March 3, 1955⁵) contain wording which is relatable to the statutory provisions quoted above. The German treaty, after a general statement that "Nationals of either Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other Party, to travel therein freely, and to reside at places of their choice," provides in the second sentence of the same paragraph that:

Nationals of either Party shall in particular be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.⁶

¹¹ *Sei Fujii v. State of California*, 38 Cal.(2d) 718, 242 Pac.(2d) 617 (1952), 46 A.J.I.L. 559 (1952). See Fairman, "Finis to Fujii," *ibid.* at 682.

¹ P. L. 414, 82nd Cong., 2nd Sess., 66 Stat. 163.

² Sec. 101 (a) (15) (e); 8 U.S.C. § 1101 (a) (15) (E).

³ T. I. A. S. 2863.

⁴ Sen. Exec. E, 84th Cong., 1st Sess.

⁵ Unofficial text in U. S. Dept. of State Press Release No. 117 (March 3, 1955).

⁶ The protocol accompanying the treaty contains in par. 2 the following: "The provisions of Article II, paragraph 1 (b), shall be construed as extending to nationals of either Party seeking to enter the territories of the other Party solely for the purpose of developing and directing the operations of an enterprise in the territories of

Retaining the well-known concept of treaty merchant,⁷ these recently negotiated treaties add that of treaty investor. The Immigration and Nationality Act of 1952 has language concerning treaty merchants which varies slightly from that in Section 3(6) of the Immigration Act of 1924 as amended in 1932.⁸ By the new language, the trade in which the non-immigrant engages must be "substantial" in nature and must be carried on "principally" between the United States and the foreign state of which the trader is a national.⁹ In the treaty practice itself there has been a change (seen first in the treaty signed with Uruguay in 1949, then in that signed with Greece in 1951, and in all of the commercial treaties which the United States has signed since that time) from most-favored-nation commitments concerning treaty merchants to less restricted language.¹⁰

Over some three decades the treaty-merchant provisions of statutes and treaties have apparently worked well.¹¹ The plan has been particularly

such other Party in which their employer has invested or is actively in the process of investing a substantial amount of capital: provided that such employer is a national or company of the same nationality as the applicant and that the applicant is employed by such national or company in a responsible capacity."

The language of the comparable section of the treaty with Japan is as follows: "Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens."

Art. II, par. 1 (b), of the treaty with Haiti has wording similar to that in Art. II, 1 (b), of the Japanese treaty, but the accompanying protocol (par. 1) follows the wording in par. 2 of the protocol accompanying the German treaty.

In each of the three treaties there is, as a final paragraph of the article containing the treaty-investor clause, the following: "The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety."

⁷ See, on this concept, Robert R. Wilson, " 'Treaty-Merchant' Clauses in Commercial Treaties of the United States," 44 A.J.I.L. 145-149 (1950).

⁸ 8 U. S. C. (1948) Sec. 203(6).

⁹ There is little in the legislative history of the new Act to indicate the purposes of these additions. A subcommittee of the Senate Judiciary Committee conducted an extensive investigation of the entire immigration system of the United States. Only small sections of its report (pp. 562-567, and statistics at pp. 903-905, in Sen. Rep. No. 1515, 81st Cong., 2nd Sess.) relate to treaty traders. Possibly relevant is a statement (in a "Synopsis of the Principal Recommendations for Changes in the Immigration and Naturalization Laws," App. II, pp. 805-810, at p. 806) that "The nonimmigrant classes are more closely and exactly defined."

¹⁰ Compare the language of Art. II, par. 3, of the commercial treaty which the United States signed with Greece on Aug. 3, 1951 (Sen. Exec. J., 82nd Cong., 2nd Sess.), in which there is provision for admission of treaty merchants on a most-favored-nation basis, with that of Art. II, par. 1(a), of the treaty signed with Israel on Aug. 29 of the same year (T. I. A. S. 2948), which does not specify the most-favored-nation standard in the matter of admitting treaty merchants. U. S. legislation does not direct that this standard be used in the treaties.

¹¹ See the observation at p. 567 of the report, cited in note 9 *supra*, that "It is the opinion of the subcommittee that the basic statutory provisions controlling the entry

useful for traders from populous states which have had, under United States immigration restrictions, relatively small quotas. Being nonimmigrants, the treaty merchants are, of course, admitted outside of quotas.

Certain business groups in the United States have advocated the broadening of such provisions as those concerning treaty merchants. Given permissive legislation by Congress, such broadening would not involve any departure by the United States, in its treaty policy, from the fundamental principle of mutuality. At the same time, its advocates have urged, it might make it possible for American firms to send abroad, for sojourn over a considerable period of time, executive, managerial and technical personnel needed for the effective operation of American business enterprises in foreign countries.¹² A move in this direction also makes more

of aliens as treaty traders under a nonimmigrant status are satisfactory in most instances.'

The status has always been a regulated one. With the going into effect of the new (1952) legislation, there has been some change in the applicable administrative regulations. Cf. 22 C.F.R. Sec. 41.70 with 22 C.F.R. Sec. 42-140. Whereas under the old regulations a treaty trader had the burden of establishing the status of a nonimmigrant under Sec. 3(6) of the Act of 1924, under the new regulations such a person has the burden of establishing not only that he is entitled to classification as a treaty trader within the meaning of the new Act, but also that he is not ineligible to receive a visa as a nonimmigrant under the provisions of instructions to consular officers implementing Sec. 212 of the Act. He must also establish, *inter alia*, that he "intends in good faith, and will be able, to depart from the United States upon the termination of his status" (22 C.F.R. 41.71 (b) (2)). By another part of the regulations, "If he is employed or to be employed, his employer shall be a foreign person or organization and he shall be engaged in duties of a supervisory or executive character, or if he is, or is to be, employed in a minor capacity, he has special qualifications which make his services essential to the efficient operation of the employer. An alien employed solely in a manual capacity shall not be entitled to classification as a treaty trader." (22 C. F. R. Sec. 41.71 (b) (3).)

Administrative regulations also provide that a trader or dependent admitted to the United States under the Immigration Act of 1924 without limitation of time shall make a report annually on the anniversary date of his original admission to the United States to the district director or officer in charge having jurisdiction over the place where the alien resides in the United States indicating that he (a) continues to be eligible for readmission to the country whence he came or for admission to some other country, and (b) that he has fulfilled and will continue to fulfill all the conditions prescribed by another section of the regulations applicable to such matters as passports and work.

Some recent judicial decisions have involved rulings as to whether residence in the United States by a treaty merchant or the son of such a merchant might be considered residence for the purpose of the later naturalization of the person. See, for example, *In re Jow Gin*, 175 F. 2d 299 (1949); *U. S. v. Lee Cheu Sing*, 189 F. 2d 534 (1951); *U. S. v. Lin Yiu*, 190 F. 2d 400 (1951); *U. S. v. Jeu Foon*, 193 F. 2d 117 (1951); *Petition of Wong Choon Hoi*, 71 F. Supp. 160 (1947); *Petition of Moy Jeung Dun*, 101 F. Supp. 203 (1951); *Yee Shee Dong*, 104 F. Supp. 123 (1952); *U. S. v. Kwan Shun Yue*, 194 F. 2d 225 (1952); *U. S. v. Kwai Tim Tom*, 201 F. 2d 595 (1953).

¹² See, on this point, text of letter from the President of the National Foreign Trade Council to the Chairman of the Senate Foreign Relations Committee, dated June 1, 1948, and reproduced in Revision of Immigration, Naturalization and Nationality Laws, Joint Hearings Before the Subcommittees of the Committees on the Judiciary, Congress of the United States, 82nd Cong., 1st Sess., on S. 716, H. R. 2379, and H. R. 2816, at 318, 319.

meaningful the provisions already in a number of commercial treaties, but largely illusory under excessively restrictive immigration curbs, whereby enterprises of one party in the territory of the other may "employ agents of their choice regardless of nationality."¹³

It is, of course, possible for Congress to confer rights with respect to entry of treaty merchants even from states which do not have commercial treaties in force with the United States. It has in fact recently done this in the case of the Republic of the Philippines,¹⁴ under a plan of reciprocity by agreement to be entered into by the President of the United States and the President of the Philippines.

It was natural that provisions concerning treaty merchants should be included when new legislation on immigration was introduced (as S. 3455) by Senator McCarran on April 20, 1950, but the exact point at which treaty-investor provisions were added to the proposed legislation is not clear. In a speech in the Senate on May 13, 1952, Senator McCarran said, in part:

After the introduction of Senate bill 3455, copies of the bill were circulated to interested governmental and nongovernmental agencies for study and comment. . . . Furthermore, a number of nongovernmental agencies submitted analyses and suggestions on the bill. In the course of numerous conferences over a period of several weeks, the various suggestions and analyses were considered, and Senate bill 3455 was further refined and each of the thousands of provisions was checked and rechecked. Thereafter, on January 29, 1951, I introduced in the Senate, Senate bill 716, which was a refinement and modification of my original bill, S. 3455.¹⁵

The provisions on treaty investors apparently emerged in the course of the "refinement and modification," for they appeared in S. 716. In the hearings on this bill, only one witness testified on the treaty-investor wording.¹⁶ Recommending favorable consideration of it, he proposed still another classification of nonimmigrant, namely, one admitted "solely to perform administrative, technical or confidential functions for an enterprise of the foreign state of which he is a national or for a domestic enterprise controlled by nationals of that foreign state."¹⁷ There was no such provision, however, in the Act as it was finally passed.

Like that of treaty merchant, the status of treaty investor is a regulated one. Administration is partly by the Department of State¹⁸ and partly by the Department of Justice.¹⁹ The former has issued detailed regulations setting forth, among other things, that the alien is to establish specifically that he is not applying for a nonimmigrant visa in an effort to evade

¹³ See, for example, Art. I, par. 2(c) of the commercial treaty between the United States and Italy, signed Feb. 2, 1948 (T. I. A. S. 1965).

¹⁴ P. L. 419, 83rd Cong., 3rd Sess., 68 Stat. 264 (approved June 18, 1954). This legislation applies both to treaty merchants and treaty investors.

¹⁵ 98 Cong. Rec. 5089.

¹⁶ Charles R. Carroll, representing the National Foreign Trade Council.

¹⁷ Hearings, cited in note 12 *supra*, at 317.

¹⁸ Sec. 104(a) of the Act; 8 U. S. C. A. Sec. 1104.

¹⁹ Sec. 103 of the Act; 8 U. S. C. A. 1103.

the quota or other restrictions which are applicable to immigrants, that he intends in good faith and will be able to depart from the United States upon the termination of his status, and that the enterprise is one which actually exists or is in active process of formation, and is not a fictitious paper operation.

In the case of the Department of Justice, the admission regulations of the Immigration and Naturalization Service apparently draw no distinction between treaty traders and treaty investors insofar as what is required of the alien is concerned. Under these regulations, one of the reasons for which a "trader or dependent" may be deemed to have failed to maintain status is his changing from activities of a treaty trader to those of a treaty investor, or *vice versa*, without previously obtaining consent to do so from the district director having administrative jurisdiction over the district in which the alien resides.²⁰ A "trader" under the 1952 Act is not required to submit an annual maintenance-of-status report to the director of immigration of his district, such as that required of traders and dependents under the 1924 Immigration Act. Regulations prescribe that the maximum time period for which a nonimmigrant may be admitted initially into the United States shall be whatever the admitting officer deems appropriate in order to accomplish the intended purpose of the alien's temporary stay in the United States;²¹ a separate provision relates to application for extension of temporary admission.²²

The new provisions of statutory law and treaties concerning treaty investors have not been in effect for a sufficient length of time to justify any final conclusions as to their practical utility. Much will depend upon the manner in which they, and the administrative regulations implementing them, are applied. It seems clear that the objective in mind is thoroughly sound. It is to be hoped that the plan of the new treaty clauses will fit in constructively with other moves aimed at promoting foreign investment and improving the world economic situation.

ROBERT R. WILSON

PLURALISM OF LEGAL AND VALUE SYSTEMS AND INTERNATIONAL LAW

A life dedicated to the study of international law, long studies on philosophy of law and more recent studies in comparative law have convinced this writer that any legal order, and hence international law, in order to be fully understood, must be studied from three approaches: analytical, sociological-historical and axiological. The analytical approach, the lawyer's approach par excellence, is indispensable; but it alone is not sufficient; it must first be supplemented—supplemented, not replaced—by the sociological-historical approach.¹ It must, second, be supplemented by an

²⁰ 8 C.F.R. Sec. 214e.4(a) (2).

²¹ *Idem*, Sec. 214.1.

²² *Idem*, Sec. 214e.5.

¹ Max Huber, Dietrich Schindler, J. L. Brierly. The true sociological approach has, of course, nothing to do with current "neo-realism." It is interesting to note that three very different writers put strong emphasis on this approach: Julius Stone, *Legal Controls of International Conflict* (New York, 1954); Mariano Aguilar Navarro, *Derecho*

axiological approach, by the study of the different legal systems and of the different systems of values which underlie these legal systems and the cultures of which they are a part. For the purpose of this investigation it is not essential whether we speak of this system of values as "natural laws"² or as mere ideologies. For even if they were not more than ideologies—Verdross has recently stated—their knowledge would still be necessary in order to understand these legal orders. The faith shared in the system of values by those subject to a legal order is, further, of the highest importance to make this legal order effective. Just as the present sociological foundation of international law limits its effectiveness, so the effectiveness of international law is hampered by the lack of a system of truly international values. This approach, still ignored by the majority of international lawyers, is today particularly important.

Our international law is a creation of Christian Europe. It has its roots in the *Respublica Christiana* of medieval Europe. The present "international community" came into being through the decentralization of the medieval unity. It remained until toward the end of the eighteenth century restricted to Christian Europe³ and its extension to the United States and Latin America did not change its legal and value basis. It was shaped by theologians and lawyers of the Roman law. Many of its norms are mere transplantations of norms of Roman private law into the international sphere. The great importance of natural law in the early development of international law merely corroborates the dominating influence of Roman law. For Roman law was regarded not only as a world law—"jus gentium"—but also as the "ratio scripta"; the contents of natural law were taken from Roman law and Catholic theology. Our international law is based on the value system of the Occidental culture, on Christian,⁴ and often Catholic, values. The Roman law-Catholic foundation has often been recognized by Protestant common-law lawyers.⁵

But even prior to 1856 the identity of legal and value systems was never complete. There were the states of Byzantine origin.⁶ There was, at the

Internacional Público (3 vols. Madrid, 1952-1954); and Charles De Visscher, *Théories et Réalités en Droit International Public* (Paris, 1953). See also Walter Schiffer, *The Legal Community of Mankind* (New York, 1954).

² It is, of course, necessary to recognize that "natural law," so called, is not law, but ethics, a system of norms superior to law, by which to judge a legal order not as law or non-law, but as good or bad law. In this sense modern adherents of natural law: the German Coing, the Spaniard Legaz y Lacambra, the Mexican Rafael Preciado Hernández. The Belgian Jean Dabin, an orthodox Neo-Thomist, now states unequivocally "Au binôme: droit naturel-droit positif il faut substituer celui de: morale-droit." *Théorie Générale du Droit* (Brussels, 1953).

³ Up to the beginning of the nineteenth century writers spoke of the "Droit des Gens de l'Europe." Still in 1856 Turkey was admitted "to participate in the advantages of the Public Law and System of Europe."

⁴ All other countries were referred to as "pays hors chrétienté."

⁵ "Existent international law is the creation of *but one historical portion* of one living culture" (italics supplied). Northrop "Contemporary Jurisprudence and International Law," 61 Yale L. J. 636 (1952).

⁶ See the Russian scholar, Baron de Taube, "Études sur le développement historique du Droit International dans l'Europe Orientale" 11 Hague Academy of International

very beginning, the antithesis between Catholicism and Protestantism. Protestant writers often claim that international law is a Protestant creation. On the other hand, modern Spanish writers⁷ blame the present crisis of international law on the fact that Catholic ethics and universality,⁸ on which the "Spanish Fathers" tried to build international law, have been abandoned. Also today there is *within* the Occidental culture a difference between Catholic and Protestant cultures and "ways of life," between Anglo-Saxon and Hispanic cultures, between England and the Continent, between the United States and Latin America, between Europe and America. There is further a duality of legal systems: civil law and common law. In view of the Roman-law basis of international law, common-law lawyers have sometimes voiced apprehension.⁹ But these differences do not threaten international law and its development. For the bases are common: the values of Occidental culture. It is a question of differences, but not of antagonisms; Catholic and Protestant, Anglo-Saxon and Hispanic, European and American values may be different, but they are also complementary.

Between 1856 and today the European Christian law of nations has, in an historical process, spread so as to constitute today the universal international law, binding also on nations of non-Occidental legal and value systems. This development was generally welcomed and praised.¹⁰ Although the reception of international law by non-Occidental nations "made Oriental adjustments and interpretations necessary,"¹¹ the problem of the binding value of European Christian international law on states of non-Occidental legal and value systems was not seen in the West. For the

Law, *Recueil des Cours* 345-535 (1926), and "L'apport de Byzance au développement du droit international occidental" 67 *ibid.* 237-339 (1939). A modern Greek writer has seen the principal reason for the many Balkan crises of the nineteenth and twentieth centuries in the "total lack of understanding which the men of Occidental Europe have shown toward the states of Byzantine origin." P. A. Papaligouras, *Théorie de la Société Internationale* 489 (Zurich, 1941).

⁷ See Aguilar Navarro, *op. cit. supra*, note 1, and Antonio de Luna, "Fundamentación del Derecho Internacional," 60 *Revista de Derecho Internacional* 210-264 (Havana, 1952).

⁸ "Humanum genus, quamvis in varios populos et regna divisum, semper habet aliquam unitatem non solum specificam, sed etiam quasi politicam et moralem." Francisco Suárez, *De legibus ac Deo legislatore*.

⁹ Thus Lauterpacht wrote some time ago that there is danger that states of the common law may be outvoted at international conferences, that international tribunals are mostly manned by Roman-law lawyers who have little (if any) knowledge of the common law, and that there is little justification today to make the development of international law exclusively dependent on Roman and civil law or to attribute to *one* system of law of a particular time and space the qualities of a *universal* law. *Private Law Sources and Analogies in International Law* 178.

¹⁰ It remained for the leading National Socialist lawyer, Carl Schmitt, to attack what he called the "dissolution" of European order in a vague and universal, so-called "international law." "Die Auflösung der europäischen Ordnung im International Law," 5 *Deutsche Rechtswissenschaft* 267-278 (1940); against him H. Wehberg, in 41 *Die Friedenswarte* 157-166 (1941).

¹¹ See the interesting account in "Japan's Reception of the Law of Nations," by Professor Zengo Ohira, 4 *Annals of the Hitotsubashi Academy* (Tokyo) 55-66 (1953).

Occidental man was not only convinced of the eternity and absolute superiority of his culture, but believed also that it had been absorbed by the rest of the world to such a degree as to have become, in fact, the only one, worldwide culture.¹² Since 1920 positive international law has recognized the pluralism of the legal and value systems of the world, in the manner of elections to the Council of the League of Nations and the United Nations Security Council, to other organs of international organizations, in the equitable distribution, as to countries, of international civil servants and, particularly, in the Statute of the Permanent Court of International Justice and now in Article 9 of the Statute of the International Court of Justice, according to which "in that body as a whole the representation of the *main forms of civilization* and the *principal legal systems of the world* should be assured."

The present situation is characterized by the decline of Europe and the total crisis of our Occidental culture. There is, further, the deep split between the free and the Communistic worlds, a split *within* the Occidental cultures; if we speak of the East-West split, the words "East" and "West" are not used in the sense of Kipling. The Soviet law is of Western origin; the Soviet ideology is based on Marx and stems, therefore, in ultimate analysis, from Hegel. Yet Soviet law is a new legal system, different from civil and common law, as recognized in the free world and emphasized by Soviet scholars.¹³ The Soviet ideology is not only different from that of the free Occidental world, but may perhaps be found to be incompatible with it. The political consequences of this split and of the "cold war" require no enumeration. There are also deep-reaching influences on international law and the law of international organization. Just as Professor Jessup,¹⁴ thinking of the "cold war," could ask whether international law should not recognize a status intermediate between war and peace, so others have asked whether the same international law can rule both the capitalistic and the Communistic worlds, whether this ideological struggle will not lead to a disruption of the unity and universality of international law.¹⁵ Although the early tendency to regard international law merely as the "law of the transition period"¹⁶ seems to have been abandoned in the Soviet Union, there is no doubt that this split and the Soviet concept of international law¹⁷ are posing and will pose many difficult problems, *de lege lata*

¹² Arnold Toynbee warned even in 1934 against the "misconception of the unity of culture." 1 A Study of History 149 ff. (1934).

¹³ "Soviet law is a completely unique type of law; it is not a further development of bourgeois law, but a new type of law." A. Golumskii and M. S. Strogovitch, quoted in "Soviet Legal Philosophy," 5 XXth Century Legal Philosophies Series 385-386 (Cambridge, Mass., 1951).

¹⁴ 48 A.J.I.L. 98-103 (1954).

¹⁵ Kurt Wilk in 45 *ibid.* 648-670 (1951).

¹⁶ Thus, E. Korovine, *Das Völkerrecht der Übergangszeit* (1929. German tr. from Russian original of 1924).

¹⁷ See Taracouzio, *The Soviet Union and International Law* (1935); S. Krylov, "La doctrine soviétique du droit international," 70 *Hague Academy of International Law, Recueil des Cours* 411-471 (1947).

and *de lege ferenda*, for international law and the law of international organizations.

There is finally the fact that the international community has today for the first time become, so to speak, *really* international through the definitive emergence and the great activity on the international stage of states of non-Occidental legal and value systems.¹⁸ Nearly one third of the Members of the United Nations are Asian and African states. They often form a bloc, supported in voting by the states of the Soviet bloc and a number of Latin American states. They are primarily interested in bringing colonial issues before the Security Council or Assembly; they are very active within the framework of Chapter XI of the United Nations Charter.¹⁹ There is also a definite policy of the states of Africa and Asia outside the United Nations.

While this "rebellion" of the present and former colonial and semi-colonial peoples is, in present-day world politics, strongly intermingled with the split between the free and the Communistic world, it should not be overlooked that the issue is a separate one which would still exist if there were no East-West split. The independence idea pervades also the non-Communistic states of Asia and Africa. Many of these peoples feel a deep resentment against centuries of Western conquest and domination. They no longer want to be regarded by the West merely as sources of raw materials, export markets, strategic bases or tourist curiosities. Theirs is a new nationalism learned from Europe. But in addition to political and economic independence, they insist on their own culture, their own legal and value systems; they demand not only to be heard in international affairs, but to make their own legal and value contributions to international law. A new world is emerging, a world in which two out of every three human beings are non-white, a world in which white superiority is no longer conceded *a priori*, but must be earned.

Even the primitive legal and value systems of the Africa south of the Sahara begin to make themselves felt on the international stage. But most important is the active appearance of the states of the three great non-Occidental cultures. There is, first, the legal and value system of Islam, forming a vast belt from Morocco to Indonesia. There is a renaissance of Islam which wants to bring back the great days of Arabic and Islamic culture; there is a movement in Syria and Pakistan to base the constitutions on the Koran, on Islamic law²⁰ and on the Islamic system of values. The emergence of an Islamic ideology not only explains the Arab diffidence toward the West, but also the ideological abyss between the Arab states and Israel, the conflict between Pakistan and India.

¹⁸ For a broader treatment, see Josef L. Kunz, "Pluralismus de Naturrechte und Völkerrecht," 6 Österreichische Zeitschrift für Öffentliches Recht 185-220 (1954).

¹⁹ See this writer's editorial in 48 A.J.I.L. 103-110 (1954).

²⁰ Moslem law has been studied, as far as the West is concerned, in England and France; see Louis Milliot, *Introduction à l'étude du droit musulman* (Paris, 1953). Recently it has also attracted attention in the United States; see Symposium on Moslem Law in 22 Geo. Wash. L. Rev. 1-39, and 127-186 (1953). In September, 1953, a Conference on Islamic Culture was held at Princeton University.

There is the legal and value system of India. India's influence under Prime Minister Jawaharlal Nehru is very pronounced in international politics, law, the United Nations, and its leadership in the "Asia for the Asians" movement. There is finally the attitude of ancient China²¹ toward law, so entirely different and far removed from the Occidental approach, the value systems of Confucius, Lao-Tse and Buddha.

The question of an effective international law, in spite of these wide differences in legal and value systems, is one of the principal problems of Professor F. S. C. Northrop's²² research. His proposal of solution is to reduce the United Nations Charter to two main articles. The first article would declare the pluralism of ideologies as the basic principle. Each Member would be requested to state its specific ideology. The Charter would guarantee to each Member the protection of its ideology within its geographical area. An international judge would know that in every decision the specific ideology of each Member within its geographical area must be protected, as long as this Member has not itself changed its ideology and so informed the United Nations. Any speaker in the United Nations, attacking the ideology of another Member, would be automatically ruled to be out of order. Thus, the author hopes, the "cold war" could be ended. Each Member, as stated, would inform the United Nations of its ideology and of each change of it made voluntarily by this Member. But experts must investigate this ideology as far as its theory of international law is concerned. If this investigation shows that this ideology is also regarded as the only valid norm for the decision of international conflicts, the nation must, before being admitted, reject this part of its ideology in writing and take an oath to recognize instead the principle of the pluralism of ideologies. The second article would impose upon each Member the duty to subject that part of its life which is international in character to the international organization. Every aggressive intervention or use of force against the ideology of another state is banned and each Member obligates itself to participate in common action against the aggressor. Thus, the author hopes, the "veto" could be eliminated and at the same time an "international police force" of such strength might be created as to make resistance sheer insanity.

This writer has no space to refute this proposal in detail. He believes that it suffices to have given an exposé of it in order to make it clear that this proposal is wholly utopian. It is incapable of being realized; it cannot be translated into effective legal norms; and even if it could, it would be wholly illusory and insufficient. The pluralism of legal and value systems is, indeed, one of the problems for an effective international law, although not the only one. Hence, a comparative study of these legal and value systems on a grand scale and in a truly scientific manner would be

²¹ See F. A. Schnitzer, *Vergleichende Rechtswissenschaft* 260-267 (Basle, 1945); René David, *Traité Élémentaire de Droit Comparé* 377-393 (Paris, 1950). See also Jean Escarra, *Le Droit Chinois*.

²² See his books: *The Meeting of East and West* (New York, 1947); *Editor: Ideological Differences and World Order* (New Haven, 1949); *id.*, *The Taming of the Nations* (New York, 1952), and his article, *loc. cit. supra*, note 5.

of great importance. Such comparative analysis must not only study the non-Occidental systems in their purity, but also take into consideration the far-reaching influences exercised on non-Occidental systems by the civil and the common law. It must take into consideration that these non-Occidental states are striving, out of poverty and misery, for prosperity, for industrial progress, for effective government and higher living standards. In these respects they must look to the West; technical assistance has a very great rôle to play, if it is given with no idea of domination. This writer believes that the non-Occidental legal and value systems are different from, but not incompatible with, those of the Occidental culture of the free world. They threaten neither the existence nor the development of universal international law. But they cannot be ignored; for they certainly will make their influence felt on the contents of international law: they will play a rôle in the formation of customary international law, in the contents of treaty-created norms, in the "general principles of law, recognized by civilized nations" and in the development of the law of international organizations.

JOSEF L. KUNZ

THE REALIST THEORY IN PYRRHIC VICTORY

The new edition of Professor Morgenthau's well-known work on *Politics Among Nations*¹ merits brief editorial comment. It is designed, the Preface tells us, to take into account such recent "political experience" as "the emergence of new trends in the structure of world politics, the development of the colonial revolution, the establishment of supranational regional institutions, and the activities of the United Nations" (p. viii). The author introduces new concepts of "containment, cold war, uncommitted nations, and Point Four" and offers "elaboration, clarification, refinement, and change" of such earlier concepts as "political power, cultural imperialism, world public opinion, disarmament, collective security, and peaceful change," with application of these concepts "to the novel developments of recent years" (p. viii). In the faith that a "realist" theory of international politics has been "largely won," a new introductory chapter has been added for outlining the major tenets of this theory.

In basic structure of organization and in general orientation of thought, this edition of Professor Morgenthau's book remains, however, substantially the same as the earlier and is, accordingly, subject to both the same praise and the same criticism.² The exploratory map of world politics presented is still largely that of nation states, possessed of certain "elements" of power, pursuing through certain conflicting policies of "*status*

¹ Hans J. Morgenthau, *Politics Among Nations* (New York: Alfred A. Knopf, 2nd ed., revised and enlarged, 1954). pp. xxviii, 626. Appendix. Bibliography, Historical Glossary and Index. \$5.75.

² L. H. Woolsey, in reviewing the first edition, outlines the structure of the book and concludes that it "is the most incisive book of its kind that has come the way of this reviewer." 44 A.J.I.L. 221 (1950). Some criticism of basic assumptions is offered in McDougal, "Law and Power," 46 *ibid.* 102 (1952).

quo” and “imperialism” and under certain limitations—imposed by “the balance of power,” “international morality and world public opinion,” and “international law”—a national interest primarily defined in terms of power. The application of this map in the concluding chapters is still to the problem of “peace,” with contrasting appraisal of the potentialities of “international organization” and of a diplomacy of accommodation.

It would seem that international lawyers might reasonably ask of a comprehensive treatise on international politics the performance of two specific intellectual tasks: first, a description of world social and power processes sufficiently comprehensive and realistic to further the creative study of international law; and second, a reasonably accurate indication of the rôle that perspectives of “legitimacy” or of “authority,” that is, of “law,” play among other variables in affecting decisions in the world power process and its constituent power processes. The first of these is needed to enable international lawyers both to categorize the events, the interactions of claim and counterclaim, to which authoritative decision-makers respond in terms of facts rather than of legal technicalities, and to relate the flow of decisions actually made and the legal prescriptions invoked to basic world community and national policies. The second is needed to preclude either overestimation or underestimation of the rôle that perspectives of legitimacy and legal procedures have played, and can be made to play, in the promotion of community values and to assist in clarifying the details of a more effective international law. It is not believed that Professor Morgenthau’s book yet performs either of these tasks in the degree that the exigencies of our time require.

The outline of world social and power processes which Professor Morgenthau offers is much too limited. Though he recognizes both the increasing fractionalization of the nation state by functional groups such as general and special international governmental organizations, political parties, pressure groups, and private associations, and the accelerating emergence of large new regional bodies politic in the alliances of traditional nation states, his emphasis is still largely upon the nation state and, despite an excellent analysis of the bases of power of nation states, he offers no comprehensive framework of theory for describing the rôles of these various participants in world social and power processes in terms of their objectives, the arenas of their interactions, their bases of power, the practices by which they shape and share values, and the effects they achieve. Even with respect to the nation state, his focus is more upon the diplomatic, ideological, economic, and military instruments of attack and counterattack than upon the prescriptions and procedures, the perspectives and practices of “legitimacy,” by which nation states formulate and apply common policy for controlling and regulating their interactions. Indeed, though the guiding definition of power offered in this edition (p. 8) is somewhat broader than that of the earlier, one does not yet find a workable distinction, essential to any notion of law, between that power which is based upon effective control or force only, and that which is based upon expectations of community authority. In his over-all appraisal of the intensity of interactions across nation state boundaries, the author

would appear, further, greatly to minimize the degree to which today "community" or "society" is in fact trans-national.

The conception of law which infuses Professor Morgenthau's book is still too much that of a static body of rigid rules. Thus, he states that courts "decide disputes on the basis of the law as it is" (p. 402) and, being identified "with the status quo and the law representing it," have "no standard of judgment transcending the conflict between the defense of the status quo and the demand for change" (p. 405). He repeats: "Law in general, and especially international law, is primarily a static social force" (p. 83). An alternative conception, perhaps both more descriptive and more capable of rendering greater service to the idea of a world increasingly governed by law, is that of law as a whole decision-making process in which many different authoritative decision-makers, not merely judges, continually formulate and reformulate policy and respond in their decisions not merely to words describing what prior decision-makers have done in earlier contexts, but also to policies projecting desired consequences into living contexts. The little words "law as it is" completely confuse whether one is describing past decisions, predicting future decisions, or prescribing what future decisions ought to be. It is not "power politics" but simple rationality to interpret inherited rules not as autonomous absolutes but rather, flexibly, in terms of the fundamental community policies they are intended to serve in contemporary contexts. With such criteria of interpretation, and with specific decision-makers identified, one would not, for example, be confronted with such difficulties in the interpretation of fundamental charters, or in the definition of "aggression" and "self-defense," as bedevil Professor Morgenthau (pp. 259, 260). Law is not merely a "limitation" upon power but is also a conscious, creative instrument in promoting both order and other values.

It is not impossible that the principal difficulties in Professor Morgenthau's book stem from the "realist" attempt, so concisely and vigorously outlined in the new introductory chapter, to isolate "politics" as an "independent sphere of action and understanding" apart from other inter-related social processes. When power processes are considered as apart from the variables which affect the choices of particular decision-makers and from the consequences of particular decisions upon other value processes, the understanding even of power is likely to be minimal. Thus, not to include demands for and expectations of "legitimacy" among the most pervasive, dependable, and economical bases of power even in international politics is most unreal.³ The major fault we would find with Professor Morgenthau's analysis is, accordingly, not that he emphasizes power too much but that he doesn't emphasize certain forms of power enough. It would, however, be ungracious to conclude without thanking him for raising the discussion of his subject above the level of triviality and casting it somewhat under the guise of eternity.

MYRES S. McDUGAL

³ Cf. L. J. Halle, *Civilization and Foreign Policy* (reviewed *infra*, p. 433), Chs. VI and VII.

NOTES AND COMMENTS

RESIGNATION OF THE EDITOR-IN-CHIEF OF THE JOURNAL

With this issue, Professor William W. Bishop, Jr., of the University of Michigan Law School, relinquishes, at his request, the position of Editor-in-Chief of the *Journal*, which he has held since April, 1953. Professor Bishop has been a distinguished Editor-in-Chief, and the *Journal* has prospered under his guidance. It was with great regret that the members of the Board of Editors and of the Executive Council of the Society, at their meetings in April last, accepted his resignation, which was impelled by an increasing burden of professional duties. This regret is tempered by the knowledge that Professor Bishop will remain an active member of the Board, to which he was elected in 1947, and that the *Journal* will continue to profit from his experience and from the excellence of his contributions.

Professor Herbert W. Briggs, of Cornell University, a member of the Board of Editors since 1939, was elected by the Executive Council Editor-in-Chief to succeed Professor Bishop.

E. H. F.

A COMMISSION AND ADVISORY COMMITTEE ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE

American juridical isolationism should come to a definite end with the enactment of H. R. 5061 and S. 1597, identical bills for the establishment of a Commission and Advisory Committee on International Rules of Judicial Procedure. The bills were introduced in the first session of the 84th Congress by Representative Celler, Chairman of the House Judiciary Committee, and Senators Kilgore and Wiley, the Chairman and the ranking minority member of the Senate Judiciary Committee.

The United States, of all the major Powers of the Western world, is the only one which has neither entered into treaties or other agreements prescribing rules for serving judicial documents, obtaining evidence and performing other procedural acts in foreign territory, nor made any substantial effort to codify and improve its extraterritorial practice. But now, one hundred and fourteen years after the signing of what appears to be the first modern treaty on civil procedure, one between Brazil and Portugal,¹ one hundred years after the enactment by the Congress of the Foreign Letters Rogatory Act,² and fifty years after most of the countries of Europe became signatories to the Hague Convention of July 17, 1905, on Civil Procedure, the United States proposes to embark on an ambitious program of codification and reform of international practice and procedure.

The Commission is to consist of two representatives each of the Departments of Justice and State, with the Attorney General as Chairman. The

¹ A. Briggs, *Cartas Rogatorias Internationales* 337 (1913).

² Act of March 2, 1855, 10 Stat. 630.

designation "International Rules of Judicial Procedure" was chosen to accord with the names "Federal Rules" of Civil and Criminal Procedure, and to express the idea that the rules will be for all courts and administrative tribunals, State as well as Federal, in which there are proceedings which, in some procedural aspect, flow across national boundaries.

The purpose of the Commission is to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." With the Advisory Committee, the Commission is to draft international agreements and any necessary legislation

to the end that procedures necessary or incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, and expeditious, and that the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved . . .

The bills were introduced at the joint request of the Attorney General and the Secretary of State in collaboration with the American Bar Association. The proposal is a direct outgrowth of the work of the Harvard Research in International Law which, in 1939, after some two years of study, published a model Draft Convention on Judicial Assistance.³ The Harvard Research was prompted to its program by the survey and report of the League of Nations Committee of Experts for the Progressive Codification of International Law on the "Communication of Judicial and Extra-Judicial Acts in Penal Matters and Letters Rogatory in Penal Matters,"⁴ to which the United States contributed so little.

From time to time, the Department of Justice has encountered difficulties in securing service of judicial documents and in obtaining evidence abroad, especially in criminal prosecutions, and in alien property, anti-trust, and tax litigation. In 1926, the Department procured the enactment of an Act, which is now Sections 1783 and 1784 of the Judicial Code, to obtain the testimony abroad of absconding witnesses in the naval oil reserve prosecutions.⁵ It was not until the mid-thirties, however, that any general survey of practice for obtaining oral testimony and documentary evidence from abroad for use in civil and criminal proceedings was undertaken. The American Bar Association commended these studies in 1938, and there followed a succession of recommendations of reform of international procedures by that Association, and by the Inter-American Bar Association, the Consular Law Society, the American Foreign Law Association, the Maritime Law Association, the Association of the Bar of the City of New York, the Pennsylvania State Bar Association, and the International Bar Association. The American Society of International Law in 1951 adopted

³ 33 A.J.I.L. Supp. 11-166 (1939).

⁴ League of Nations Doc. A.15.1928.V.; 22 A.J.I.L. Spec. Supp. 46 (1928).

⁵ See *Blackmer v. U. S.*, 284 U. S. 421 (1932).

a resolution favoring the negotiation of treaties and international agreements of judicial assistance.⁶

The opening of communications with enemy territory following the end of hostilities in 1945 presented our State and Federal courts with problems of practice which they were ill equipped to handle.⁷ Due to dislocations of the war, parties and witnesses, and their books and records, were scattered over the world. There was a vast increase in litigation in which proof of foreign public or private documents was necessary or where service on persons abroad of some judicial document such as a summons, a subpoena, or an order to show cause had to be made. Most notable was the number of cases requiring proof of foreign law. Foreign jurisdictions reported a marked increase of similar litigation.

Switzerland, as the principal haven of neutrality and refuge for flight capital, became the most important of foreign jurisdictions; but Switzerland repeatedly refused to permit the taking of depositions, even of American citizens, within its territory. During the occupation of Japan and Germany prewar prohibitions of the taking of depositions were, of course, abrogated; but upon the effective date of the Peace Treaty, Japan reasserted her prewar position that testimony could be secured in Japan only by a request to a Japanese court. Possibly West Germany, on regaining her sovereignty, will again restrict our consular officers to the execution of depositions of American citizens in accordance with the Treaty of Friendship, Commerce and Consular Rights of 1923. Perhaps more than one half of the countries of the world either prohibit entirely the taking of depositions within their territory or limit them to the testimony of American citizens. Of our twenty-three consular conventions, there is only one with a civil-law country, Mexico, which permits our consuls to take depositions "of any person." This presumably includes nationals of Mexico as well as of third countries.

The only way evidence can be obtained in civil-law jurisdictions which forbid the taking of depositions is by means of a letter rogatory, a writ of international judicature, little known to American lawyers, but of standard usage and wide utility in the civil law. Letters rogatory, however, have proved futile in some cases because of the inability of the courts of certain countries to issue compulsory process to compel testimony from hostile witnesses upon requests of American courts. Courts of both The Netherlands and Germany refuse judicial assistance in these circumstances because of the lack of a treaty to serve as a legal basis for their own process.

The divergent procedures of our common-law jurisdictions and those of the civil-law countries render letters rogatory an unsatisfactory instrument for American lawyers. The inquisitorial procedure of courts of the civil-law system, with the absence of free examination and cross-examination by counsel, the inability of counsel personally to inspect and examine documents of which the court orders production, the overabundance of

⁶ Proceedings, American Society of International Law, 1951, p. 188.

⁷ See H. L. Jones, "International Judicial Assistance: Procedural Chaos and a Program for Reform," 62 Yale L. J. 615 (1953).

privileges against testimony, the inability to examine a party as a witness, the lack of a verbatim transcript, the delay and cost of translating the letter rogatory and attached papers into the language of the foreign court, and of translating the court's report of its examination of the witnesses and documents back into English—all combine to minimize the present utility of letters rogatory in American litigation.

The testimonial assistance of our courts is no more satisfactory to civil-law courts than theirs is to us. Only in the few States which have adopted the Uniform Foreign Depositions Act, or similar legislation, will compulsory process issue to compel the appearance of a witness before a commissioner designated by a foreign court. And Section 1782 of the Judicial Code, a vestige of the original Foreign Letters Rogatory Act, now speaks only of "depositions" for foreign courts, and requires that they be taken in accordance with Federal procedure, a requirement which may render the testimony of doubtful value in a foreign civil-law court with its inquisitorial procedure.

Of paramount importance at the present time is the hostile attitude which both our Federal and State courts have exhibited over the past century to letters rogatory from foreign criminal courts. From a misconstruction of their statutory authority, a wizened view of their inherent power, and a misreading of the confrontation provision of the Sixth Amendment, Federal courts have refused all assistance to foreign courts in criminal proceedings. Most State courts have followed their example. As a result, it is repeatedly stated in the Continental literature of *entr'aide judiciaire*⁸ that no help can be expected of American courts in criminal matters.

There are now over 500,000 Americans residing abroad. More than a million more of our armed forces, their dependents and civilian components, are now subject to the jurisdiction of foreign criminal courts under such agreements as the Status of Forces Agreement with the NATO countries⁹ and Japan.¹⁰ For this reason alone it would appear high time that we revise our archaic ideas of judicial non-cooperation in criminal matters. While amendatory legislation has made Section 1782 of the Judicial Code, providing for compulsory process in "depositions" for foreign courts, applicable to "judicial proceedings" and hence to criminal trials, question could conceivably be raised whether a preliminary investigation by an examining magistrate, such as a French *juge d'instruction*, prior to any determination by a *chambre d'accusation* that a suspect should be brought to trial,¹¹ is really a "judicial proceeding" within the meaning of Section 1782. Moreover, Section 1782 is even less well adapted to obtaining evidence for a foreign criminal proceeding than for a civil matter.

⁸ *E.g.*, 4 *Répertoire de Droit International* 139 (1929); 4 *Travers, Le Droit Pénal International* 201 (1921).

⁹ T.I.A.S. No. 2846; 48 A.J.I.L. Supp. 83 (1954).

¹⁰ T.I.A.S. No. 2848.

¹¹ See Keedy, "The Preliminary Investigation of Crime in France," 88 U. of Penn. L.R. 692 *et seq.*, and 931-933 (1940).

On the other side of the picture, criminal proceedings in this country, if oral or documentary evidence must be obtained from abroad, may be hampered by even greater restrictions on the use of depositions abroad than are civil proceedings. There is an almost complete lack of authoritative information as to whether subpoenas and orders to show cause may be personally served abroad under Sections 1783 and 1784 of the Judicial Code. And there is no assurance that foreign private records "made in regular course of business" can be proved by the restricted method of a commission issued to a consular officer as provided by Sections 3491-4 of the Criminal Code.

We have no consular convention with a civil-law country which recognizes personal service of judicial documents as a legitimate consular function. Such service is regarded as a much more serious matter by legal systems of the Romanesque tradition than by the common law. In addition to refusing to recognize or enforce a judgment of an American court obtained pursuant to personal service on a person within its territory without following local law,¹² a civil-law government might regard such service as a violation of its sovereignty.¹³ It appears reasonable to assume that those countries which forbid or restrict the taking of depositions within their territory would similarly object to the personal service of judicial documents, especially those of a compulsive character, within their territory.

This unsympathetic attitude of foreign governments towards common-law personal service is repaid, tit for tat, by refusal of our courts to comply with requests made by civil-law courts for service of documents.¹⁴

The third aspect of international practice mentioned in the bills for consideration by the Commission is proof of foreign law. Most proposals as to foreign law are directed to facilitating the collection and authentication of foreign legal materials, such as the texts of codes and judicial decisions, used by experts in their testimony, and to giving the judge ready access to such material, and even to certificates of foreign governmental officials or courts as to the tenor of foreign law in *ex parte*, non-contested or agreed cases, as has long been customary in European courts in all cases.

The greatest obstacle to effective and comprehensive reform of international practice and procedure is the ignorance and misunderstanding of the lawyers of one system of law of the procedure and legal concepts of the other systems. Before any treaty drafted by the Commission can be successfully negotiated and utilized, a campaign of reciprocal education is necessary. This has already been begun by the International and the

¹² Inter-American Juridical Committee, Report on Uniformity of Legislation in International Cooperation in Judicial Procedures, 20(Mimeo.1952). For a comment on this report, see H. L. Jones, "International Judicial Assistance," 2 Am. J.Comp. L. 365 (1953).

¹³ *Quaere*, whether it would be considered a violation of Art. 271 of the Swiss Penal Code (the Foreign Official Acts Statute).

¹⁴ Matter of Romero, 56 Misc. 319, 107 N.Y. Supp. 621 (Sup.Ct. 1907); *re* Letters Rogatory out of the First Civil Court of the City of Mexico, 261 Fed. 652(S.D.N.Y. 1919).

Inter-American Bar Associations which have established bases for committees of the Bar throughout the world.

The bills provide for an Advisory Committee of lawyers, judges, and other persons competent to advise the Commission. The executive officer of the Commission will be a Director-Reporter. It is contemplated by the sponsors of the bills that the democratic methods of draftsmanship originated by the American Law Institute and followed by the Supreme Court Advisory Committees will now be carried into the international field.

When it is considered that there are perhaps more than 350 procedurally autonomous jurisdictions in the world, the project would appear to have vast dimensions. Many agreements,¹⁵ however, including not only multilateral conventions such as the Montevideo Treaties of Procedural Law of 1889 and 1940, The Hague Conventions on Civil Procedure of 1896 and 1905, and the Bustamante Code of 1928, but over twenty bilateral treaties between the United Kingdom and countries of the civil law, have been negotiated over the past hundred years. While a multilateral convention between the United States and the other common-law countries appears desirable and feasible, it will probably be found advisable to approach the states of the Romanesque, Islamic and other non-common-law systems on a selective basis by the bilateral treaty method. There should be no insurmountable barriers to the negotiation of agreements by the United States.

HARRY LEROY JONES

JAMMING AND THE PROTECTION OF FREQUENCY ASSIGNMENTS

The International Telecommunication Union made a decision at the Atlantic City Conferences in 1947 to afford international protection to all frequencies registered in a new international frequency list and used in conformity with the Radio Regulations. This decision was a logical climax to the Union's half-century-long struggle to eliminate harmful interference in the international radio services.¹ However, by failing to couple this decision with changes in certain older provisions in ITU treaties, the Union has created a serious contradiction in the international rights and duties of the users of radio.

According to the Radio Regulations adopted at Atlantic City, all frequencies notified to the International Frequency Registration Board, examined by the Board and registered in the new international frequency list, "shall have the right to international protection from harmful interference."² Later, if the Board finds that the operation of a new radio station causes harmful interference in the registered frequency, "it shall be 'prima facie' evidence that the operation is in violation of (the) Regulations."³ Conversely, there is an article in the Telecommunication Con-

¹⁵ The reporters of the Harvard Draft listed 123 of "the more important" agreements. Appendix I, 33 A.J.I.L. Supp. 119 (1939).

¹ For a full account of the Atlantic City conferences, see Codding, *The International Telecommunication Union* (Leiden, 1952), Chs. 6 and 7.

² ITU, *Atlantic City Radio Regulations* (1947), Art. 11, par. 1, sec. (2).

³ *Ibid.* par. 12, sec. (3).

vention obliging members of the Union to establish and operate all of their radio stations, no matter what their purpose, "in such a manner as not to result in harmful interference to the radio services or communication of other Members," whether private or public in nature, "which operate in accordance with the provisions of the Radio Regulations."⁴

On the other hand, the right of a country to suspend undesirable communications is a concept older than the Telecommunication Union itself. Articles providing for censorship were incorporated in the first telecommunication convention in a form similar to that which existed in the earliest telegraph conventions.⁵ The pertinent articles in the currently effective 1952 Buenos Aires Telecommunication Convention⁶ read as follows:

ARTICLE 29

Stoppage of Telecommunications

1. Members and Associate Members reserve the right to stop the transmission of any private telegram which might appear dangerous to the security of the state or contrary to their laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage of any such telegram or any part thereof, except when such notification may appear dangerous to the security of the state.

2. Members and Associate Members also reserve the right to cut off any private telephone or telegraph communication which may appear dangerous to the security of the state or contrary to their laws, to public order or to decency.

ARTICLE 30

Suspension of Services

Each Member or Associate Member reserves the right to suspend the international telecommunication service for an indefinite time, either generally or only for certain relations and/or for certain kinds of correspondence, outgoing, incoming or in transit, provided that it immediately notifies such action to each of the Members and Associate Members through the medium of the General Secretariat.

Although the word "telecommunications" used in the title of Article 29 includes radio, the first article clearly applies primarily to telegrams and telephone conversations. The wording of the second article, however, leaves no room for interpretation; any service can be suspended, with or without reason.

Due to the characteristics of radio waves, the only practicable means of stopping foreign broadcasts, other than by prohibiting the actual posses-

⁴ ITU, Buenos Aires Telecommunication Convention (1952), Art. 45. This article is identical to that contained in the Atlantic City Regulations. Before 1947, however, members were only obliged to prevent harmful interference "as far as possible." See, for instance, ITU, Madrid Telecommunication Convention (1932), Art. 35.

⁵ See, for instance, ITU, St. Petersburg Telegraph Convention (1875), Arts. 7 and 8.

⁶ Buenos Aires Convention, *op. cit. supra*, Arts. 29 and 30.

sion of a radio receiver, is by transmitting another radio signal, on or close to the same frequency, of a strength and type that renders the broadcast unintelligible to persons equipped with receivers; in other words, by intentionally causing "harmful interference." The question then arises, could the country in which the propaganda-broadcasting station is located claim "international protection from harmful interference" and insist that the jamming country live up to its obligation to operate its transmitters in such a manner as to prevent harmful interference? What weight would such an argument have against the jamming country's claim that it had the right to censor, according to Articles 29 and 30, just as long as it notifies the country being jammed?⁷

The Union had occasion to resolve the dilemma during the Buenos Aires Conference in 1952, but it failed to take advantage of its opportunity.⁸ Several proposals had been made to amend Article 29 to make it more difficult for countries to justify the censorship of outgoing news dispatches and in general to bring the convention more in line with the principle of freedom of information as contained in the Universal Declaration of Human Rights.⁹ Although attempts were made to confine the discussions that followed to the problem of press telegrams alone, on several occasions statements were made that had a bearing on the over-all prob-

⁷ For the purposes of this discussion, it is assumed that the country broadcasting the unwanted programs is using a frequency duly registered in the international frequency list. Different problems would arise if the broadcast was made on a frequency on which the broadcaster had no claim. Recently, for instance, a third party's broadcasts on a registered frequency were interfered with by country A jamming a propaganda broadcast, using a directional antenna, originating in country B. The third party was forced to request the country making the propaganda broadcasts to cease operation so that the jamming country would, in turn, stop making interference.

⁸ The use of jamming as a method of stopping unwanted communications was touched upon at the 1932 Madrid Conference when the radio convention was being merged with the telegraph convention to form the first Telecommunication Convention. A draft article was submitted, to occupy the same place that Art. 29 does in the Buenos Aires Convention, which read as follows: "*Les gouvernements contractants se réservent le droit d'arrêter la transmission de toute télécommunication ou de brouiller toute émission radioélectrique jugées dangereuses pour la sûreté de l'État ou contraires aux lois du pays, à l'ordre public ou aux bonnes mœurs, à charge d'en avertir immédiatement le bureau ou la station d'origine, sauf dans le cas où il y aurait inconvénient grave à émettre cet avis.*" 56 *Journal télégraphique* 161-162 (1932). When the article appeared in the Madrid Convention, the phrase concerning jamming of radio transmissions had disappeared. In his report to the Secretary of State, the American delegate made the following statement: "The . . . article has been used as the basis of censorship of press messages in various countries and an attempt was made by some delegations to have its terms made more restrictive so that it might have been advanced as the basis for even stricter censorship of such messages. Your delegation . . . successfully resisted such efforts." United States Department of State, *International Radiotelegraph Conference, Madrid, 1932, Report to the Secretary of State by the Chairman of the American Delegation with Appended Documents*, Conf. Ser. No. 15, 1934, pp. 335-336. As praiseworthy as were the American intentions, if the phrase had been left in the convention, it would have been extremely difficult for the delegates at the Atlantic City Conferences to ignore the contradiction that they were creating.

⁹ See ITU, *Documents of the Plenipotentiary Conference, Buenos Aires, 1952* (Buenos Aires, 1952, mimeographed), Nos. 13, 102, 135 and 144.

lem of the censorship of foreign broadcasts. The Norwegian delegate, for instance, objected to adding a phrase to Article 29 whereby members of the Union would pledge themselves "to encourage the free transmission of information by telecommunication services," because the word "telecommunication" was so broad that it might mean that "broadcasting could be the object of certain restrictions by virtue of Article 29."¹⁰ The Norwegian delegate was evidently of the opinion at the time that Article 29 could not be used to justify jamming. The delegate of the U.S.S.R. expressed the view that no nation would think of using Articles 29 and 30 to censor true and factual incoming or outgoing news. Articles 29 and 30 should be retained, however, to permit the censorship of news containing anything that would constitute "incitement to aggression, to war, to the use of force."¹¹ On the other hand, the delegate of Egypt, speaking also for Syria, stated bluntly that he would not accept "any interpretation of Articles 29 and 30 that will restrict the right of their governments to regulate freely all kinds of telecommunications transmitted from, received at, or in transit through their territories."¹²

The discussions at the Buenos Aires Conference resulted in the passing of the following resolution,¹³ entirely separate from the convention itself:

UNRESTRICTED TRANSMISSION OF NEWS

The Plenipotentiary Conference of the International Telecommunication Union, Buenos Aires,
in view of

1. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948;

2. Articles 28, 29 and 30 of the International Telecommunication Convention, Atlantic City,

conscious of

the noble principle that news should be freely transmitted;

recommends

Members and Associate Members of the Union to facilitate the unrestricted transmission of news by telecommunication services.

Inasmuch as no change was made in either Article 29 or 30, this was a very ambiguous statement.¹⁴

The failure of the Union to resolve its dilemma at the Buenos Aires Conference paves the way for serious difficulties in the future. The high-frequency broadcasting band, on which most of the present international propaganda broadcasts are being made, will come into effect with

¹⁰ *Ibid.*, Doc. 446, p. 21.

¹¹ *Ibid.* 15.

¹² *Ibid.*, Doc. 448, p. 12.

¹³ Buenos Aires Convention, *op. cit. supra*, Recommendation No. 2. Reference to Art. 28 was added at the last minute. Art. 28 "recognized the right of the public to correspond by means of the international service of public correspondence."

¹⁴ The resolution was adopted by an unrecorded vote of 49 to 11, with 9 abstentions, after a suggestion to delete all reference to Arts. 29 and 30 was rejected by a vote of 43 to 22, with 5 abstentions. Buenos Aires Documents, *op. cit. supra*, No. 488, pp. 11 and 12. See the discussions in Doc. 446, pp. 11-21, and Doc. 448, pp. 2-13.

the remainder of the new international frequency list.¹⁵ When this occurs, international protection from harmful interference will be extended to the frequency notifications in this extremely troublesome band. Thereafter, as long as broadcasting remains a major weapon of propaganda warfare, the possibility of conflicting claims will be present. Rather than await a rash of incidents, it would be wise for the Union to make the problem a major issue at the next radio or plenipotentiary conference.

GEORGE A. CODDING, JR.
University of Pennsylvania

INTERNATIONAL BAR ASSOCIATION

The Executive Council of the International Bar Association has elected Loyd Wright of Los Angeles, currently President of the American Bar Association, as its chief executive officer—Speaker of the House of Deputies and Chairman of the Executive Council.

At the invitation of the Norwegian Bar Association, the Council voted to hold the Sixth International Conference of the Legal Profession under the auspices of the International Bar Association in Oslo, Norway, during the week of July 23–28, 1956. The Council also elected to membership the Danish Law Society.

The following topics have been selected for discussion in Oslo in Plenary Sessions and Symposia:

1. International Ship-Building Contracts—particularly legal problems in connection with finance and security.
2. Foreign Divorces—problems arising and possible solutions.
3. The Legal Profession—the work of the organized Bar in furthering the legal profession and its public services.
4. Administration of Foreign Estates—problems of executors and possible solutions.
5. Suggestions for Alleviating Hardships Arising from Sovereign Immunity in Tort and Contract.
6. Suggestions for Improvement of International Treaties to Avoid Double Taxation.

The following topics will be discussed in committee meetings:

1. Ways and Means of Improving Facilities for Legal Aid for Foreign Nationals, Whether Resident or Non-resident.
2. Immigration and Naturalization.
3. Difficulties Arising in Connection with Taking Evidence Abroad.

¹⁵ For the manner and the time of the coming into effect of the high-frequency broadcasting portion of the new international frequency list, see ITU, Agreement for the Preparation and Adoption of the New International Frequency List for the Various Services in the Bands Between 14 kc/s and 27,500 kc/s With a View to Bringing Into Force the Atlantic City Table of Frequency Allocations, Geneva, 1951, Art. 11. See also United States Department of State, Telecommunications Policy Staff, Report of the United States Representative on the Administrative Council of the International Telecommunication Union, Ninth Session, May 1–29, 1954, pp. 4 and 5.

4. Human Rights.
5. Proposals for an International Code Regulating the Handling of Property of Enemy Nationals and Residents in Enemy-Occupied Territory.

The International Bar Association is a federation of the National Bar Associations of practically all the nations outside the Iron Curtain. The membership comprises fifty-eight associations from forty-eight countries. Individuals are affiliated with the IBA as Patrons. Inquiries concerning the International Bar Association may be addressed to the undersigned at 501 Fifth Avenue, New York 17, N. Y.

GERALD J. McMAHON

Acting Secretary General, International Bar Association

ANNUAL AWARD CONFERRED UPON JUDGE CHARLES DE VISSCHER

The American Society of International Law at its annual meeting on April 30 last conferred its certificate of merit upon Judge Charles De Visscher of Belgium for the contribution made to international law by his treatise entitled "*Théories et Réalités en Droit International Public*."

The Committee on Annual Award, whose recommendation was unanimously approved by the Executive Council and by the members of the Society, made the following statement in its report recommending the award:

Mr. De Visscher is a Belgian jurist and statesman, whose extraordinary career includes such titles as Former Judge of the Permanent Court of International Justice and of the International Court of Justice, Former Minister of the Government of Liberation, Professor of the University of Louvain, Member and former President of the Institut de Droit International, Member of the Académie Royale de Belgique and Correspondant de l'Institut de France. He has devoted a long and distinguished career to the field of international law in which he is an outstanding authority.

The recent work of Mr. De Visscher, *Théories et Réalités en Droit International Public*, was published in Paris (Editions A. Pedone) at the end of 1953. It is a masterpiece of forceful thinking and original writing on a subject of the very greatest timeliness. The finished contribution of so mature a scholar is especially welcome in this confusing postwar period when international lawyers are attempting to rethink a host of challenging problems.

THE MANLEY O. HUDSON MEDAL

The American Society of International Law is pleased to announce the establishment of an endowment fund for the award of a gold medal to be known as "The Manley O. Hudson Medal" for pre-eminent contributions evidenced by distinguished scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice.

The endowment, in the form of securities valued at over \$5,000, was presented to the Society by Mr. Ralph G. Albrecht of New York City, a life member of the Society, in honor of Judge Manley O. Hudson, former Judge of the Permanent Court of International Justice, Bemis Professor of International Law at Harvard University, and a distinguished member and former president of the Society.

The medal is to bear the name and likeness of Judge Hudson and is to be awarded from time to time to outstanding distinguished contributors of any nationality to the scholarship and achievements of their time in international law. Under the terms of the endowment the first medal is to be conferred upon Judge Hudson himself at the 50th anniversary celebration next year of the founding of the Society.

In offering the endowment, Mr. Albrecht stated that "My purpose in establishing this award is to honor a friend and teacher who has contributed much to the world of his time, by suitably perpetuating the memory of his distinguished name and great work." He expressed the hope that the endowment "will long serve as a recognition of high achievement in the field where Judge Hudson serves with such distinction."

ELEANOR H. FINCH
Executive Secretary

EIGHTH ANNUAL SUMMER INSTITUTE ON INTERNATIONAL
LAW AND THE UNITED NATIONS

The University of Michigan Law School held its Eighth Annual Summer Institute on International Law from June 23 to 28, 1955, in Hutchins Hall, Ann Arbor, Michigan. This was the latest in the series of annual institutes which have been held since 1948 under the sponsorship of the Law School as a part of its program of public service, for the purpose of providing a medium for high-level discussions of important problems in areas of public concern. This year's institute, under the chairmanship of Professor William W. Bishop, Jr., was planned as a forum to gain perspective on international law developments affecting teachers, researchers and practitioners in international law and related fields, and to provide an evaluation of the first decade of the United Nations and its future prospects.

On Thursday, June 23, the subject of "New Vistas in International Law" was discussed by Professor Philip C. Jessup of Columbia University, and Professor Milton Katz, Director of International Legal Studies, Harvard Law School. "The Policy Science Approach" was presented by Professor Myres S. McDougal of Yale Law School. "The Law of International Trade and Investment" was the subject of a talk by Professor Henry de Vries of Columbia University Law School, and commercial treaties were discussed by Professor Robert R. Wilson of Duke University.

Needed and projected research in international legal studies was the subject of a panel presentation by Professors Herbert W. Briggs of Cornell University, Quincy Wright of the University of Chicago, Stefan A. Riesen-

feld of the University of California Law School, and Mr. Louis B. Wehle of the New York Bar.

On Friday, June 24, under the general title of teaching of international law, talks were delivered on "The Introductory Law School Course" by Professor Jessup; "International Organization Courses and International Organization in International Law Courses" by Professor Louis B. Sohn of Harvard Law School; and "International Law Seminars" by Professors Michael Cardozo of Cornell Law School, Joseph Dainow of Louisiana State University Law School, William W. Bishop, Jr., of the University of Michigan Law School, and James O. Murdock of George Washington University.

Mr. Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs, Department of State, discussed "Contemporary Developments Concerning International Agreements." Dean E. Blythe Stason of the University of Michigan Law School, and Mr. Roy B. Snapp of the D. C. Bar spoke on "The Challenge of the Atom to International Legal Studies."

Saturday, June 25, was devoted to discussion of the question of "Adapting International Law to New Needs as Exemplified in the Fields of High Seas Fisheries, the Continental Shelf, and Territorial Waters," with particular reference to drafts prepared by the United Nations International Law Commission and others. Participants in the discussion were Mr. Edward W. Allen, of Seattle, Washington, member of International Fisheries Commissions; Mr. Donald Chaney, General Counsel, U. S. Fish and Wild Life Service; Mr. William Herrington, Special Assistant to the Under Secretary of State for Fisheries and Wild Life Matters; Professor Philip C. Jessup; Mr. Montgomery Phister, General Counsel and Vice President of the Van Camp Sea Food Company; Professor Stefan A. Riesenfeld; and Dr. Marjorie Whiteman, Assistant Legal Adviser for Inter-American Affairs, Department of State.

Monday, June 27, was devoted to a review of the first decade of the United Nations. The Honorable Ernest A. Gross, formerly Legal Adviser of the Department of State, Assistant Secretary of State, and Deputy U. S. Representative to the U.N. Security Council, spoke on "The United Nations after a Decade." The following particular subjects were also discussed: "The United Nations and Law in the World Community," by Mr. Leonard Meeker, Assistant Legal Adviser for United Nations Affairs, Department of State; "Constitutional Developments of United Nations Political Organs," by Mr. Eric Stein, Office of United Nations Political Affairs, Department of State; "Trends and Development in the United Nations," by Professor Clyde Eagleton of New York University; "The Veto and the Security Council," by Professor Leo Gross of the Fletcher School of Law and Diplomacy; and "International Negotiations under Parliamentary Procedure," by Professor Jessup.

On Tuesday, June 28, review and revision of the United Nations Charter were discussed by Professor Louis B. Sohn, and Mr. James N. Hyde, of the New York Bar. Under the title of "Limitations on What the United Nations Can Do Successfully," the question of restrictive business practices as a subject for United Nations action was discussed in

the affirmative by Mr. Sigmund Timberg of the D. C. Bar, and in the negative by Mr. Gilbert Montague, of the New York Bar.

The talks and comments of the scheduled speakers and commentators on the program were followed by general discussion.

ELEANOR H. FINCH

ANNUAL MEETING OF THE SOCIETY

The 49th Annual Meeting of the American Society of International Law was held April 28-30, 1955, at the Sheraton-Carlton Hotel in Washington, D. C. The attendance was excellent and the program was an interesting one. It was arranged in a series of three panels, each panel having one main speaker, who was followed by several commentators on different aspects of the subject discussed. The chairmen of the three panels acted as commentators upon the presidential address.

President Philip C. Jessup opened the meeting on Thursday evening April 28, 1955, at 8:15 o'clock with an address on "Power, Facts and Law." He was followed by Professor Herbert W. Briggs of Cornell University, Mr. Louis B. Wehle of the New York Bar, and Professor Hardy C. Dillard of the University of Virginia Law School, who offered brief comments on points raised in the address.

On Friday morning, April 29, 1955, the first panel, under the chairmanship of Professor Briggs, considered recent developments in regional organization. The principal paper was delivered by Professor Norman J. Padelford of the Massachusetts Institute of Technology. The panel commentators consisted of Mr. Joseph W. Bishop, Jr., of the New York Bar; Dr. Kurt Steiner, of the Center of International Studies, Princeton University; Dr. Alwyn V. Freeman, of the Staff of the Senate Committee on Foreign Relations; and Mr. Richard R. Baxter, Research Associate in Law, Harvard University.

On Friday afternoon, the subject of the panel discussion was practice and procedure before international claims commissions, including general principles and techniques of effective presentation of claims. Mr. Louis B. Wehle, of the New York Bar, was presiding chairman. Mr. Dudley B. Bonsal of the New York Bar presented a paper entitled "International Claims—A Lawyer's View on a Diplomat's Nightmare." His address was the subject of comments by the Honorable Whitney Gilliland, Chairman of the Foreign Claims Settlement Commission; Dr. Martin Domke and Professor Douglas E. Dayton of New York University.

Following the Friday afternoon session, an informal reception was held in the North Lounge of the Sheraton-Carlton Hotel for the members, their wives and husbands to meet the speakers, President and officers of the Society.

On Friday evening at 8:15 p. m. the third panel subject was international law and current problems in the Far East. Professor Hardy C. Dillard of the University of Virginia Law School presided. Mr. Arthur H. Dean of the New York Bar, and former United States Ambassador in charge of negotiations for the Korean Armistice on behalf of the United Nations

Command, delivered the principal paper, which was followed by comments by the Honorable Herman Phleger, The Legal Adviser, Department of State, the Honorable Stanley K. Hornbeck, former Director of the Office of Far Eastern Affairs, Department of State, and Professor Hans Morgenthau of the University of Chicago.

Rapporteurs of the general discussions of each of the subjects considered on Friday were, respectively, Professor Brownlee S. Corrin of Goucher College, Mr. William G. Bowdler, Office of Regional American Affairs, Department of State, and Professor Robert W. Tucker, of Johns Hopkins University. The summarized discussions will appear in the printed *Proceedings* following the prepared remarks under each panel heading.

The annual meeting closed on Saturday evening, April 30, with a dinner at which Professor Philip C. Jessup, the outgoing President, presided. The speakers were Ambassador Morehead Patterson, United States Representative for the International Atomic Energy Agency Negotiations; His Excellency Sir Leslie K. Munro, Ambassador of New Zealand, and the Honorable John J. Sparkman, United States Senator from Alabama. Ambassador Patterson spoke on "Atoms for Peace and the International Community," Ambassador Munroe, on "The Present-Day Rôle of the Security Council in the Maintenance of Peace and Security," and Senator Sparkman on "The United Nations and the Future."

At the business session of the Society on Saturday morning, April 30, Professor Clyde Eagleton presented the Report of the Committee on Study of Legal Problems of the United Nations in the form of a survey of those activities of the United Nations during 1954 which would be of interest to international lawyers. The Report, with annexed tables on the status of treaties which had been opened for signature or entered into force during the year, as well as of accessions to treaties already in force, and draft conventions prepared during the period, will be printed in full in the *Proceedings*.

Following discussion of the above-mentioned report, and before hearing reports of other committees of the Society, President Jessup announced the receipt by the Society of an endowment fund donated by Mr. Ralph G. Albrecht, of New York City, for the purpose of establishing the Manley O. Hudson Medal (see above, p. 389), and stated that a distinguished sculptress had been commissioned to prepare the medal. The Society thereupon adopted a motion of appreciation to Mr. Albrecht for his generous gift.

A number of memorials were presented in honor of the distinguished members of the Society who had passed away during the year, including Mr. Justice Robert H. Jackson, Mr. Frederic R. Coudert, Sr., Mr. Arthur K. Kuhn, Honorable Hugh Gibson, Honorable Charles Warren, Mr. George Maurice Morris and Mr. Sanford Freund.

The Report of the Committee on Annual Awards was next presented, and the Society approved its recommendation that the award be conferred upon Judge Charles De Visscher for his book entitled *Théories et Réalités en Droit International Public* (see above, p. 389).

The Society also, upon the recommendation of its Committee on Selection of Honorary Members, elected Judge Hersch Lauterpacht, recently appointed a member of the International Court of Justice, an honorary member of the Society.

Professor Robert R. Wilson reported for the Committee on Financing and Endowment that the Committee had prepared a plan to promote a better understanding of international law by means of a series of projects for research studies, discussions with other interested organizations, expansion of departments of the *American Journal of International Law*, regional meetings of the Society, conferences of teachers of international law and special speakers from abroad for the anniversary meeting of the Society in 1956. He stated that the plan envisaged securing of funds from some foundation to carry out the proposed activities, and that the Executive Council had authorized the President of the Society to proceed along the lines of the report.¹

Mr. Denys P. Myers submitted the Report of the Committee on Publications of the Department of State, and upon his motion, duly seconded and carried, a resolution was adopted calling upon the Department of State "to resume publication of *United States Treaty Developments* in a feasible, periodical form utilizing funds either specially allocated or appropriated therefor."

Several proposed amendments to the Society's Constitution were next considered. The first sentence of Article III on membership was amended by eliminating the provision for nomination of new members of the Society, so that the sentence as amended reads:

New members may be elected by the Executive Council acting under such rules and regulations as it may prescribe.

A new provision for *members emeriti* was inserted as the third paragraph of Article III, reading as follows:

Persons who shall have completed fifty years of membership in the Society may thereafter be declared by the Executive Council *members emeriti* and thereupon shall be entitled to all the privileges of the Society without payment of dues.

Article VI of the Constitution regarding the Executive Council was amended by inserting at the beginning of the second sentence of the first paragraph the following: "The Council shall adopt regulations consistent with this Constitution . . ."

The Report of the Nominating Committee was next presented and the following officers were elected for the coming year: Professor Quincy Wright of the University of Chicago, President; the Honorable John Foster Dulles, Secretary of State, Honorary President; Professors Herbert W. Briggs, Charles Fairman and Robert R. Wilson, Vice Presidents. The

¹ In accordance with the authorization of the Executive Council the President of the Society has appointed the following committee, designated as the 50th Anniversary Management Committee, to carry out the project: Philip C. Jessup, *Chairman*; William W. Bishop, Jr., *Vice Chairman*; Hardy C. Dillard, Frederick S. Dunn, Ernest Gross, Milton Katz, Carl B. Spaeth, Quincy Wright, *ex officio*.

existing incumbents were re-elected Honorary Vice Presidents, and Mr. Justice Harold H. Burton of the United States Supreme Court, the Honorable Stanley K. Hornbeck, Honorable William S. Culbertson and Honorable Amos J. Peaslee, Ambassador to Australia, were elected Honorary Vice Presidents to fill vacancies caused by the deaths of Messrs. Coudert, Jackson, Kuhn and Warren.

The following were elected members of the Executive Council to serve until 1958: Michael H. Cardozo, Cornell University; Kenneth S. Carlston, University of Illinois; Martin Domke, American Arbitration Association; Harry LeRoy Jones, Department of Justice; Milton Katz, Harvard University; Samuel K. C. Kopper, Arabian American Oil Company; Carl B. Spaeth, Stanford University; Marjorie Whiteman, Department of State.

The Nominating Committee elected for the coming year is: Clyde Eagleton, New York University, *Chairman*; Louis B. Wehle, New York; Charles E. Martin, University of Washington; Ruth C. Lawson, Mount Holyoke College; William W. Bishop, Jr., University of Michigan.

ELEANOR H. FINCH

ALBERT DE GEOUFFRE DE LA PRADELLE

MARCH 30, 1871—FEBRUARY 2, 1955

In the death of M. de La Pradelle international law, the international community, and humanity, lost a devoted and valuable servant. M. de La Pradelle was a talented and energetic worker in the field of international jurisprudence and also in humanitarian enterprises of all kinds.

Space does not permit a recital here of his various activities in these fields. His academic preparation was, of course, unexceptionable—*lauréat de la Faculté de Droit, doctorat (médaille d'or)*, and so on; this was followed by a distinguished career in Grenoble, Paris, The Hague, and many other international centers. M. de La Pradelle's writings and editorial activities were legion, the best known being the *Revue de Droit International* and the *Revue de Droit International Privé*. Countless articles, comments, and other contributions appeared in scores of European journals of all types. De La Pradelle held numerous official posts under his own government and other governments and international agencies. He held numerous distinctions and orders of merit in various countries. He was a doctor *honoris causa* of Columbia University.

M. de La Pradelle was not without his personal opinions, social and political. He was criticized for these views in various quarters, but no one ever challenged his idealism, his public spirit, his devotion to international co-operation and justice. His chief criticism of the League of Nations, for example, was the relatively light emphasis placed upon international law under its auspices.

The undersigned had the privilege and the pleasure of working with M. de La Pradelle in the Ethiopian affair. He was, as on all other occasions, erudite, competent, charming; he was far above the level of the officials and other persons with whom he had to deal. The international community and the world would be very much better off if we had more colleagues of the stature of M. Albert de Geouffre de La Pradelle.

P. B. P.

JUDICIAL DECISIONS

BY OLIVER J. LISSITZYN

Of the Board of Editors

Nationality—claims—naturalization in claimant state—effect of lack of genuine connection with claimant state

NOTTEBOHM CASE (LIECHTENSTEIN *v.* GUATEMALA). I.C.J. Reports, 1955, p. 4.

International Court of Justice.¹ Judgment of April 6, 1955.

Liechtenstein brought this case against Guatemala, asking the Court to declare that

The Government of Guatemala in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law and consequently in a manner requiring the payment of reparation.

Liechtenstein further asked damages and the restoration of Nottebohm's property in Guatemala, or alternatively payment of the "estimated present market value of the seized property had it been maintained in its original condition."

Guatemala asked the Court to declare the claim inadmissible (i) because of the lack of prior diplomatic negotiations, (ii) on grounds of nationality of the claimant, and (iii) for failure to exhaust local remedies. Guatemala also contended that there was no violation of international law committed by Guatemala in regard to Mr. Nottebohm. On the nationality point, Guatemala contended that Nottebohm had not "properly acquired Liechtenstein nationality in accordance with the law of the Principality," that "naturalization was not granted to Mr. Nottebohm in accordance with the generally recognized principles in regard to nationality," and that

Mr. Nottebohm appears to have solicited Liechtenstein nationality fraudulently, that is to say, with the sole object of acquiring the status of a neutral national before returning to Guatemala, and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself.

The Court found that Nottebohm was born in Germany September 16, 1881, was German by birth, and still possessed German nationality in October, 1939, when he applied for naturalization in Liechtenstein. He became a resident of Guatemala in 1905 and remained in business there,

¹ Composed for this case of Judge Hackworth, President; Judge Badawi, Vice President; Judges Basdevant, Zoričić, Klaestad, Read, Hsu Mo, Armand-Ugon, Kojevnikov, Zafrulla Khan, Moreno Quintana, Cordova; and Judges *ad hoc* Guggenheim and Garcia Bauer. The French text of the judgment is authoritative.

making trips back to Germany for business and to other countries for holidays. After 1931 he paid a few visits to a brother who lived in Liechtenstein. His other brothers, relatives and friends were in Germany and Guatemala. He "continued to have his fixed abode in Guatemala until 1943." In the spring of 1939 he left Guatemala and went to Germany and Liechtenstein, applying in Liechtenstein for naturalization through his attorney on October 9, 1939. During October his naturalization was completed, he took the oath of allegiance, and on December 1 his Liechtenstein passport was visaed by the Guatemalan Consul General in Zurich. Nottebohm returned to Guatemala early in 1940. In 1943 Nottebohm was taken into custody and removed to the United States as a dangerous enemy alien, where he was detained in internment until early 1946. Upon his release he went to Liechtenstein. Meanwhile Guatemala had proceeded against his property as that of an enemy alien.

It appeared that under Liechtenstein law the applicant for naturalization must prove that his acceptance into the "Home Corporation" (*Heimatverband*) of a Liechtenstein commune has been promised, that he will lose his former nationality (though this may be waived), that he has resided at least three years in the territory of the Principality (though "this requirement can be dispensed with in circumstances deserving special consideration and by way of exception"), and that certain fees are paid.

The Court held, by 11 votes to 3, "that the claim submitted by the Principality of Liechtenstein is inadmissible." Judges Klaestad and Roac, and Judge *ad hoc* Guggenheim, gave dissenting opinions.

In its opinion the Court stated:

Thus, the real issue before the Court is the admissibility of the claim of Liechtenstein in respect of Nottebohm. Liechtenstein's first submission referred to above is a reason advanced for a decision by the Court in favour of Liechtenstein, while the several grounds given by Guatemala on the question of nationality are intended as reasons for the inadmissibility of Liechtenstein's claim. The present task of the Court is limited to adjudicating upon the admissibility of the claim of Liechtenstein in respect of Nottebohm on the basis of such reasons as it may itself consider relevant and proper.

In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to seise the Court of a claim relating to him. In this connection, Counsel for Liechtenstein said: "the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States." This formulation is accurate, subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality con-

ferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Court's own function.

In order to establish that the Application must be held to be admissible, Liechtenstein has argued that Guatemala formerly recognized the naturalization which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.

The Court did not find in the facts anything "to show that before the institution of proceedings Guatemala had recognized Liechtenstein's title to exercise protection in favour of Nottebohm and that it is thus precluded from denying such a title." Nor was any recognition by Guatemala found in the correspondence concerning the case. The Court continued:

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein.

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are

binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an im-

portant factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court. National laws reflect this tendency when, *inter alia*, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article I of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals "shall be recognized by other States in so far as it is consistent with . . . international custom, and the principles of law generally recognized with regard to nationality." In the same spirit, Article 5 of the Convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law" (P.C.I.J., Series A, No. 2, p. 12, and Series A/B, Nos. 20-21, p. 17).

Since this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character, or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State? . . .

The essential facts are as follows:

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that

country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers: but his brother's presence is referred to in his application for naturalization only as a reference to his good conduct. Furthermore, other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal.

obligations—and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.

The Court is not therefore called upon to deal with the other pleas in bar put forward by Guatemala or the Conclusions of the Parties other than those on which it is adjudicating in accordance with the reasons indicated above.

*Gold of the National Bank of Albania—meaning of word “belonged”
—Inter-Allied Reparations Agreement—restitution*

ARBITRAL OPINION RELATIVE TO THE GOLD OF THE NATIONAL BANK OF ALBANIA. 10 *Annuaire Suisse de Droit International* 11 (1953).

Brussels, February 20, 1953. Sauser-Hall, Arbitrator.

In 1925 a private financial group, in which Italian interests played the leading rôle, entered into an agreement with the Albanian Government for the organization of a National Bank of Albania, as authorized by special Albanian legislation. Under this legislation, the seat of the *direction centrale* of the Bank was to be at the Albanian capital, but the seat of the Council (*Conseil*) and of the Committee of Administration (*Comité d'administration*) could be established abroad. The Bank was to be the depository of Albanian state funds and was to perform the functions of a public treasury. It was given the power to coin metallic money and to issue paper currency which was to be covered by a gold reserve.

The Bank was organized at a meeting in Rome in the form of a joint-stock company (*société par actions*), and its statutes, which were in conformity with the Albanian legislation, were approved by the Italian Minister of Finance and deposited with the Albanian Minister of Finance. Under the statutes, the seat of the Council and the Committee of Administration was fixed at Rome, where all the shareholders' meetings were held. The Bank's gold reserve was purchased in the international market with Italian currency and, except for small amounts kept in the Albanian offices of the Bank, was at all times deposited at Rome, mostly at the Italian Mint (*Hôtel de la Monnaie*). Italian nationals at the outset held 45% of the common stock and all of the founders' shares. The Albanian Government at no time held any of the Bank's capital. The proportion of the common stock held by Albanian nationals gradually dropped from 30% at the beginning to 1.5% by September, 1943. In 1935, the Italian Government nationalized by decree all of the stock held by the Italian stockholders and also embarked on a program of purchasing stock held by foreign interests, with the result that as of September 16, 1943, the Italian state owned 88.5% of the Bank's common stock and founders' shares.

On September 16, 1943, the Bank's gold in Rome was seized by the German forces and removed to Berlin, where, under an agreement with the Albanian Government, it was earmarked for the *direction centrale*

of the National Bank of Albania and kept at the Reichsbank. On January 13, 1945, the National Anti-Fascist Council of Albanian Liberation enacted a law annulling the agreement of 1925 for the creation of the Bank and transferring to the Albanian State the Bank's assets and liabilities.

The Inter-Allied Reparations Agreement of Paris, signed on January 14, 1946, by 18 states including the United States, France, the United Kingdom and Albania, provided for the pooling of all monetary gold found in Germany and its "distribution as restitution" among the participating countries in proportion to their respective losses of gold through looting or wrongful removal to Germany. Under the terms of the Paris Agreement Italy was in 1947 admitted to its benefits by a special protocol. The governments of the United States, France and the United Kingdom, acting pursuant to the Paris Agreement, established a Tripartite Commission for the Restitution of Monetary Gold. Albania and Italy claimed the gold of the National Bank of Albania removed from Rome. The Tripartite Commission referred these conflicting claims to the three governments by which it had been set up. The latter, on April 25, 1951, signed in Washington an agreement to seek the opinion of an arbitrator, to be designated by the President of the International Court of Justice, on the question whether the gold "belonged" to Albania or to Italy or to neither. The three governments undertook to accept the arbitrator's opinion. The governments of Albania and Italy, as well as the three signatory governments, were to be assured the opportunity to present to the arbitrator all the documents, proofs and arguments concerning the questions submitted to him.

The President of the International Court of Justice designated M. Georges Sauser-Hall, of Swiss nationality, as the arbitrator. Despite an invitation from the arbitrator, the Albanian Government failed to participate in the proceedings which began on November 5, 1951. The United States did not take an active part. Italy reiterated its claim to the gold. The United Kingdom, interested in the possibility of applying the gold in satisfaction of the judgment of the International Court of Justice in the Corfu Channel case in its favor, as provided in a Declaration attached to the Washington Agreement of 1951,¹ supported the claim of Albania. France maintained that the gold belonged neither to Italy nor to Albania.

After disposing of some subsidiary points, and noting that the Paris Agreement on gold was based on the recognition of a right of *postliminium*, the arbitrator considered the meaning of the word "belonged" (*appartenait*) in the Washington Agreement and a corresponding expression in the Paris Agreement. He held that he had to pass on the respective claims as of September 16, 1943, the date on which the gold was removed from Rome, and that he could not consider claims based on events subsequent

¹ See the Judgment of the International Court of Justice in the Case of the Monetary Gold Removed from Rome in 1943, [1954] I.C.J. Rep. 19, digested in 48 A.J.I.L. 649 (1954).

to that date. According to the dictionaries, the arbitrator found, the word "belong" and its French equivalent could either refer to ownership or signify "to pertain, to relate, to concern." It was the latter meaning, the arbitrator thought, that must be attributed to the term "belong." The narrower meaning could not have been intended by the parties, since it would have assured the restitution of monetary gold only to those states which owned such gold outright. The parties must have known that in a majority of states the monopoly of issue of paper money covered by a gold reserve was entrusted to banks which were owned by private persons in whole or in part and had legal personalities distinct from those of the states. Moreover, the adoption of the French view that the gold belonged neither to Italy nor to Albania would leave open the question of the restitution of the gold. Italy never owned the gold nor did the gold ever figure in the accounts of any public or private Italian bank; it was not Italian monetary gold. On the other hand, although the gold was not owned by Albania, it covered Albanian paper currency, and related to or concerned Albania, being the property of a bank governed by Albanian law which played the rôle of a central bank in Albanian financial economy. The latter was seriously affected by the loss of the gold. These and other facts and considerations, the arbitrator held, established that the gold belonged to Albania within the meaning of the Paris Agreement.

Sovereign immunity of foreign state—restrictions—jurisdiction over counterclaims

NATIONAL CITY BANK OF NEW YORK v. REPUBLIC OF CHINA. 348 U. S. 356.

U. S. Supreme Court, March 7, 1955. Frankfurter, J.¹

An agency of the Republic of China in 1948 established a \$200,000 deposit account with petitioner bank. When respondent sought to withdraw the funds the bank refused to pay and was sued in a U. S. district court. The bank interposed two counterclaims seeking an affirmative judgment for \$1,634,432 on defaulted Treasury Notes of respondent owned by the bank. The Court of Appeals affirmed a judgment dismissing the counterclaims.² On certiorari, the bank dropped its demand for affirmative relief, reducing the counterclaims to mere demands for set-off.³ The Supreme Court reversed the judgment and remanded the case with directions to reinstate the counterclaims. The Court said⁴ in part:

The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court. Accordingly, we start with the fact that the Republic and its governmental agencies enjoy a foreign sovereign's immunities to the same extent as any other country duly recognized by the United States. . . .

¹ Reed, Burton and Clark, JJ., dissented.

² 48 A.J.I.L. 332 (1954).

³ In a footnote, the Supreme Court indicated that the counterclaims had been confined to a set-off "as a result of the accepted jurisprudence of sovereign immunity."

⁴ Footnotes omitted.

The freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds. Very early in our history this immunity was recognized. *De Moitez v. The South Carolina*, Bee 422, 17 Fed. Cas. 574, No. 9,697 (Admiralty Court of Pa., 1781, Francis Hopkinson, J.), and it has since become part of the fabric of our law. It has become such solely through adjudications of this Court. Unlike the special position accorded our States as party defendants by the Eleventh Amendment, the privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court. . . .

But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. . . .

The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process. . . .

More immediately touching the evolution of legal doctrines regarding a foreign sovereign's immunity is the restrictive policy that our State Department has taken toward the claim of such immunity. As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. . . . Its failure or refusal to suggest such immunity has been accorded significant weight by this Court. . . . Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government. . . .

And so we come to the immediate situation before us. The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange*, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its "exclusive and absolute" jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the "power and dignity" of the foreign sovereign.

(a) The Court of Claims is available to foreign nationals (or their governments) on a simple condition: that the foreign national's government can be sued in its courts on claims by our citizens. . . . Thus it seems only fair to subject a foreign sovereign, coming into our courts by its own choice, to a liability substantially less than our own Government long ago willingly assumed.

(b) The Republic of China is apparently suable on contract claims in its own courts, and Americans have the same rights as Chinese in those courts. No parochial bias is manifest in our courts which would make it an affront to the "power and dignity" of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own. Decisions of the Chinese courts which seem to grant absolute immunity from direct suit to foreign sovereigns are inapposite in this context and in light of our State Department's reluctance to raise the defense of sovereign immunity in foreign courts

(c) Respondent urges that fiscal management falls within the category of immune operations of a foreign government as defined by the State Department's 1952 pronouncement. This is not to be denied, but it is beside the point. A sovereign has freely come as a suitor into our courts; our State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China.

(d) It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity. This is proof positive that the doctrine is not absolute, and that considerations of fair play must be taken into account in its application. But the limitation of "based on the subject matter" is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity. There is great diversity among courts on what is and what is not a claim "based on the subject matter of the suit" or "growing out of the same transaction." . . . No doubt the present counterclaims cannot fairly be deemed to be related to the Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and the petitioner may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation. The considerations found controlling in *The Schooner Exchange* are not here present, and no consent to immunity can properly be implied. . . .

U. S. executive agreements—validity

UNITED STATES *v.* GUY W. CAPPS, INC. 348 U. S. 296.

U. S. Supreme Court, February 7, 1955. Burton, J.

The United States sued as third-party beneficiary an importer of potatoes for breach of a contract not to divert for table-stock purposes seed potatoes imported from Canada. The contract had been made to carry out an executive agreement between Canada and the United States. The Court of Appeals affirmed a judgment directing a verdict for defendant, on the ground that the executive agreement was void.¹ The Supreme Court "granted certiorari to determine whether the significant constitutional and statutory questions discussed by the Court of Appeals were necessary for the decision of the case and, if so, to give them consideration." It found that the evidence did not show a violation of the contract

¹ 48 A.J.I.L. 153 (1954).

and unanimously affirmed the decision solely on this ground, saying in part:

In view of the foregoing, there is no occasion for us to consider the other questions discussed by the Court of Appeals. The decision in this case does not rest upon them.

International organizations—United Nations—privileges and immunities—employees—testimony before Congressional committees

KEENEY v. UNITED STATES. 218 F.(2d) 843

U. S. Ct. of Appeals, Dist. of Col., Aug. 26, 1954; petition for rehearing in banc denied, Oct. 22, 1954. Edgerton, Ct. J.

Appellant, a former employee of the United Nations, was prosecuted for contempt of Congress because she did not answer, when testifying before a Subcommittee of the Committee on the Judiciary of the United States Senate, the question whether anyone in the State Department had aided her in obtaining employment with the United Nations. She asserted a privilege by reason of the Charter and the Staff Rules of the United Nations. On appeal, her conviction¹ was reversed and a new trial ordered. The court held that there were errors in the admission of evidence and that "[i]n so far as the answer depends upon data in the files of the United Nations or upon information derived from those files, it was privileged by the Charter and the Staff Rules and could not legally be revealed." Prettyman, Ct. J., concurring, indicated that information obtained outside official channels was not privileged. Danaher, Ct. J., concurring, was of the same opinion, but felt that the court did not have to pass on the question of privilege, since there was no suggestion that "by virtue of her official position the appellant gleaned knowledge from the official files as to how her employment came about." Edgerton, Ct. J., speaking on this issue only for himself, thought that

Compulsory disclosure of the persons who influence appointments to the staff of the United Nations would not be consistent with the independence of the Organization or "the exclusively international character of the responsibilities of the Secretary-General and the staff * * * (Art. 100, Par. 2.) And the prospect of such disclosure might influence staff members, in one degree or another, to regulate their official conduct with a view to avoiding embarrassment of sponsors. The privilege of non-disclosure is therefore "necessary for the independent exercise of their functions in connection with the Organization." (Art. 105, Par. 2.)

Military occupation—Japan—liability of United States for acts of Japanese Government directed by SCAP

ANGLO CHINESE SHIPPING COMPANY v. UNITED STATES. 127 F. Supp. 533.²

U. S. Court of Claims, January 11, 1955. Whitaker, J.

Plaintiff, a Hong Kong corporation, sued the United States for the use of its vessel, which had been seized by the Japanese during the war and

¹ Digested in 47 A.J.I.L. 715 (1953).

² Cert. denied. New York Times, May 24, 1955.

in 1946 located at Yokohama. The Supreme Commander for the Allied Powers directed the Japanese Government to retain it for the purpose of laying and repairing submarine cables, and it was accordingly retained until 1950.

Plaintiff's petition was dismissed. The court, after reciting various agreements for the postwar occupation and government of Japan, said¹ in part:

It is clear that the occupation of Japan was a joint venture of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China; but does that absolve the individual nations from liability for an act taken on behalf of all? . . .

The Allied Powers, of course, was not a body politic. It was an association of sovereign states. Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. Any action taken by him was taken as the agent of the United States of America, as the agent of Great Britain, and as the agent of China and of Russia. Whatever use there may have been of plaintiff's vessel by the Allied Powers, it was a use by all of them. The Supreme Commander was acting as the agent for each of them.

When private parties or private corporations or municipal corporations enter into a joint venture, the parties are jointly and severally liable for the acts of their agent, and their individual property may be levied upon to satisfy any judgment, at least after the assets of the joint venture have been exhausted. Whether this rule should be applied to sovereign nations engaged in a joint enterprise has never been decided, and we do not now decide it, because we do not think any of the Allied Powers are liable, for the reasons to be stated.

Plaintiff's vessel never came into the possession of the occupying powers. When the Japanese conquered Hong Kong they seized the vessel and it remained in their possession until it was returned to its owners. It is true the Supreme Commander directed them to retain it, but this direction was issued only because the Japanese Government was powerless to act except with the approval of the Supreme Commander. . . .

The laying and repairing of these cables was for the benefit of Japan. Japan itself outfitted the vessel and manned it and used it in laying and repairing the cables. The responsibility for the use of it in so doing is Japan's responsibility. The cables were not for temporary use by the Allied Powers only during their occupation; they were for long-time use extending far beyond the period of occupation. The fact that the occupying powers got an incidental benefit from the use of them during their occupation renders them no more liable for the cost of laying and repairing them than any other person who might use them. That cost must be borne by Japan. That cost includes payment for the use of plaintiff's vessel.

NOTE: Cf. the opinion of the Swiss Federal Political Department concerning liability for damages sustained by Swiss nationals in the International Zone of Tangier, April 30, 1952, in 10 *Annuaire Suisse de Droit International* 238 (1953).

¹ Footnote omitted.

Property of United States citizens abroad—effect of Fifth Amendment—executive agreements—confiscation and use of property in enemy territory—status of Austria

SEERY v. UNITED STATES. 127 F. Supp. 601.

U. S. Court of Claims, January 11, 1955. Madden, J.

Plaintiff, a naturalized citizen and resident of the United States, sued the United States for alleged damage to her houses in Austria, taken in July, 1945, by the United States Army for an officers' club, and for alleged theft of personal property situated in the houses. She asserted that she was entitled to just compensation for her property taken for public use.

Government's motion to dismiss for lack of jurisdiction was denied. The court rejected the contention that the guarantee of just compensation contained in the Fifth Amendment was inapplicable because the property was not in the United States, citing *Turney v. United States*.¹ Even if Austria were regarded as enemy territory, the court went on to say, the precedents cited by the Government did not support the contention that the property was subject to confiscation, since it was not a product of enemy soil, or hostile property, or property which endangered the safety of our troops, or property of a person who lived within the enemy lines. Furthermore, the use of the property was not necessary to permit a commander in the field to meet emergency situations. But the court deemed it unnecessary to decide the question of lawfulness of confiscation in enemy territory, since it held that Austria was not, at the time, enemy territory, being regarded by the Executive Department as a liberated nation.

The court further considered the effect of an agreement between the U. S. High Commissioner in Austria and the Austrian Chancellor² which provided for the payment by the United States of a sum of money to Austria in full settlement for all claims, including such as was here involved, and by which Austria guaranteed full protection to the United States against such claims. The court said in part:

We are now confronted with this problem. From what we have said in this opinion, it is evident that we think that the plaintiff's property was taken under such circumstances that she was entitled under the Fifth Amendment to the Constitution, to be paid just compensation. We must now decide whether the agreement took that right from her. . . .

Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights. Statements made in our opinion in *Etlimar Societe Anonyme of Casablanca v. United States*, 106 F.Supp. 191, 123 Ct. Cl. 552, which point in the other direction, are hereby overruled. The decision in the *Etlimar* case, *supra*, was justified by the fact that the plaintiff there sought and obtained the compensation from France to which the executive agreement there involved relegated it. . . .

¹ Noted in 48 A.J.I.L. 513 (1954).

² 61 Stat. 4168.

It is probably still the law that Congress could effectively destroy a citizen's Constitutional right such as, for example, the right to just compensation upon a taking of his property by the Government, by a statute withdrawing the Government's consent to be sued. But Congress have [*sic*] given consent to be sued for such a taking and has conferred jurisdiction upon this court to adjudicate such a suit. It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen.³

Extradition—political offenses—punishment as for a political crime—effect of conditions in Poland

RE KOLCZYNSKI. [1955] 1 All Eng. L.R. 31.

England, Q. B. D., Dec. 13, 1954. Lord Goddard, C.J., Cassels and Devlin, JJ.

Seven Polish members of the crew of a Polish fishing trawler in the North Sea took charge of the trawler, putting the master and other crewmen under restraint and wounding a political officer, and put into an English port where they asked for political asylum. Having been committed by a magistrate, pursuant to a request of the Polish Government under a treaty of extradition, for extradition on a charge of revolt on the high seas and, in the case of Kolczynski, unlawful wounding, they applied for habeas corpus. The magistrate had found that all the acts were done by applicants solely for the purpose of leaving their country and involved a minimum of injury to persons and property. Habeas corpus was granted and the applicants released, having been permitted by the Secretary of State to remain in the country.

The court recited the conditions prevailing in Poland as a police state, and pointed out that, under the British Extradition Act and the treaty with Poland, a fugitive was not to be surrendered if the offense charged was of political character or if he proved to the satisfaction of the court "that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character." The court was of the belief that the applicants committed an offense of a political character and that, if surrendered, they would be punished as for a political crime. Lord Goddard, C.J., said in part:

The evidence . . . showed that the applicants while at sea found that a political officer was overhearing and recording their conversations and keeping observation on them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding or, at least, expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for a political offence and in my opinion, therefore, the offence had a political character. . . . The evidence as to the law prevalent in the Republic of Poland today shows that it is necessary,

³ For a discussion of this case, see editorial above, p. 362.

if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.

Foreign armed forces—privileges and immunities—U. S. base in Canada

GALLANT v. WEST. [1955] 1 D.L.R. 441.

Canada, Newfoundland Sup. Ct., Nov. 2, 1954. Dunfield, J.

The American Commander of Harmon Field, a United States Air Base in Newfoundland established and maintained under a treaty, published and distributed to members of a visiting United States military unit a booklet in which the bedrooms in plaintiff's hotel were listed as off limits. The booklet found its way into civilian hands outside the Base and plaintiff sued the Commander for libel. In dismissing the action, the court held that the Commander had at least qualified privilege in communicating with his troops, and that in the absence of a showing of express malice the action did not lie. The court then discussed, without deciding, the question whether there was also absolute privilege, and thought that

organized foreign Forces under their own commands in this country by arrangement are entitled to be treated on the same footing as if they were our own Forces. . . . Insofar as the former Commander, who originally ordered the premises to be placed off-limits, communicated with his own men within his Base, there cannot be said to be either libel at all or publication at all from the point of view of Canadian law. In other words, these are Acts of State, orders, not statements; and orders made in his unfettered discretion; and made within his own fences.

The court went on to discuss the ways in which the orders might become known outside the Base, and concluded that the American military authorities "went about the matter in a judicial and well-considered way, and not abruptly nor arbitrarily."

Treaties—effect in law of India—interpretation—Tibet

SHRI KRISHNA SHARMA v. STATE OF WEST BENGAL. 54 Cri. L.J. 1722 (Calcutta).

India, Calcutta High Ct., Feb. 2, 1954. Guha, J.

In an action for writs in the nature of habeas corpus, petitioners, detained under the Preventive Detention Act for alleged smuggling of goods from India to Tibet, relied, in part, on the provisions of the Anglo-Tibet Trade Regulations, 1914, negotiated pursuant to the Simla Convention of 1914 which was ratified and accepted as binding by Great Britain and Tibet, although not ratified by China. Petitioners contended that Clause VIII of the Regulations, which permitted the imposition of prohibitions or restrictions on traffic in certain designated classes of articles, by implication guaranteed complete freedom of trade in all other articles. The court was inclined to agree with this contention, citing with approval the

maxim expressio unius est exclusio alterius, and saying that "a treaty has to be liberally construed so as to carry out the intention and purpose of the contracting parties." Petitioners' application was rejected, however, on the ground that

the general principle is that though municipal Courts are competent to inquire into matters involving the construction of treaties and other acts of State, treaty obligations cannot be enforced in municipal Courts.

The situation was not changed by the Indian Independence (International Arrangements) Order, 1947, providing for the devolution of international rights and obligations on India and Pakistan. Furthermore, the court pointed out, the Anglo-Tibet Trade Regulations were inconsistent with subsequent Indian legislation. The court said that if the Indian statutes

be in conflict with any principle of international law . . . municipal courts of India have got to obey the laws passed by the Legislature of the country to which they owe their allegiance. In interpreting and applying municipal law, these Courts will try to adopt such a construction as will not bring it into conflict with rights and obligations deducible from rules of international law. If such rules, or rights and obligations are inconsistent with the positive regulations of municipal law, municipal Courts cannot override the latter. It is futile in such circumstances to seek to reconcile, by strained construction, what are really irreconcilable.

Jurisdiction—Morocco—Tangier—U. S. capitulatory privileges—treaties—effect on third parties—most-favored-nation clause—usage—International Court of Justice

MACKAY RADIO AND TELEGRAPH COMPANY *v.* EL KHADAR. No. 3010.¹
Morocco, International Jurisdiction of Tangier, Court of Appeal, Aug. 13, 1954.

In an action to compel the performance of a contract to sell land, defendant, an American corporation, objected on the ground of its nationality to the competence of the Court of First Instance of the International Jurisdiction of Tangier. A judgment overruling this objection² was reversed on appeal. The court pointed out that this was an action *in personam*, and not a real action subject to the International Jurisdiction under the Law on the Registration of Real Property. The decision must be based on the interpretation and application of treaties governing capitulatory jurisdiction. The judgment of the International Court of Justice concerning the extent of American capitulatory rights in Morocco³ was not decisive, since its application was expressly limited to the French Zone of Morocco; moreover, the judgments of the International Court of Justice do not have binding force on individuals in litigation before domestic courts, but are binding only on the contending states which must

¹ A translation of this decision was made available by Colonel Howard S. Levic, Washington, D. C.

² Noted in 49 A.J.I.L. 267 (1955).

³ 47 *ibid.* at 136 (1953).

enact the necessary legislative measures to carry them out. The purported abrogation of the capitulatory regime in Tangier by the Convention of Paris (of 1923) was binding only on the parties thereto, and not on a non-adhering Power such as the United States. (The court cited the example of Italy which continued to exercise consular jurisdiction until the protocol of 1928 was signed.) The Final Act of 1945 and United States participation in certain organs of the International Administration in no way modified its position or presupposed a renunciation of acquired privileges, the disappearance of which may only come about through an express declaration.

The court then considered the question whether the capitulatory rights and privileges acquired by the United States through treaties with Morocco and applicable in terms to matters arising between United States citizens had been extended by custom, usage or treaty to actions in which the defendant (alone) was a United States citizen. The court inclined to the view that privileges acquired through the operation of the most-favored-nation clause did not automatically lapse when the most favored nation renounced its privileges, but pointed out that the renunciation by Great Britain in 1937 of its capitulatory rights did not extend to the Spanish Zone. Furthermore, the court cited various treaty provisions and diplomatic documents as showing the survival of American capitulatory privileges based on usage in the absence of renunciation by the United States, and concluded that these privileges (which extended to actions in which United States citizens were defendants) did survive. Accordingly, the International Jurisdiction was held not competent to entertain this suit.

International organizations—acts of French Government—jurisdiction of French administrative tribunals

CASE OF WEISS. 81 Journal du Droit International (Clunet) 745.

France, Council of State, February 20, 1953.

A claim against the French Government growing out of claimant's dismissal by the Institute of Intellectual Co-operation in 1941, the failure to obtain execution of an award in his favor by the Administrative Tribunal of the League of Nations, and the lack of support by the French Government for his candidacy for a position with UNESCO, was dismissed for want of jurisdiction. The court said that the examination of the claim would imply an appreciation of the acts of the French Government in its relations with international organs or foreign states, and that the acts of the French authorities relating to candidacies for positions in an international organization are directly connected with appointment of officials by that organization, being consequently, like the appointments themselves, outside the jurisdiction of the Council of State.

NOTE: In an appended note, Pierre Huet points out that the Institute of Intellectual Co-operation had been set up by a French statute pursuant to an international undertaking, and gives other facts bearing on the case.

Jurisdiction—foreign armed forces—NATO Status of Forces Agreement

CASE OF GADOIS. 81 Journal du Droit International (Clunet) 737.

France, Paris, Ct. of Appeal (*Chambre des mises en accusation*), Dec. 14, 1953.

In a suit growing out of a fatal injury inflicted in 1952 on a Frenchman by an American Army truck driven by an American soldier in the course of his duties, it was held: (1) The NATO Status of Forces Agreement¹ determined the issue of penal jurisdiction over the driver, although the Agreement came into force as to France after April 22, 1953, since no decision on the merits of the case had been made by the time of the coming into force of the Agreement; (2) the primary jurisdiction over the alleged offender belonged, under Article VII of the Agreement, to the United States, even though there was no showing that the accused was prosecuted in an American court or that the alleged offense was punishable by American law. The French courts, therefore, had no jurisdiction. The court noted that this decision did not adversely affect plaintiff's interest in obtaining pecuniary compensation, for which a special provision is made in the Agreement. (A Note by B. G. is appended to the report of this case.)

Sovereign immunity—character of activity—Italian courts

ONORI v. STATE OF HUNGARY. 37 Riv. di Diritto Int. 383.

Italy, Rome, Ct. of Appeal (Labor Section), Nov. 18, 1953.

Plaintiff brought an action for wrongful dismissal against the Hungarian Academy in Rome, which belonged to the Hungarian State, and against the latter. She had been employed as housekeeper of a hostel operated by the Academy for the convenience of students and guests. The Hungarian Government in a diplomatic note claimed immunity on the ground that the functioning and maintenance of the Academy were closely related to the sovereign activities of the Hungarian State. A judgment dismissing the action for lack of jurisdiction was reversed on appeal. Although the operation of the Academy, the court indicated, might be considered, under an Italo-Hungarian cultural convention, as a governmental function, this was not true of the operation of the hostel, even if it was designed to facilitate the activities of the Academy. When a foreign state enters into economic relations as a private person and places itself on a footing of juridical equality with private persons, it loses its jurisdictional immunity in Italian courts.

NOTE: The Italian Court of Cassation, United Civil Sections, held that although the Sovereign Military Order of Malta is a subject of international law, it is not entitled to immunity when acting *jure privatorum*, as in entering into a contract of agency for the sale of goods, even though the goods were purchased by the Order from the Government of Argentina and re-sold to the Bizonal Government in West Germany. *Sovereign Military Order of Malta v. Soc. Comaria*, 37 Riv. di Dir. Int. 380 (July 14, 1953).

¹ T.I.A.S. No. 2846; 48 A.J.I.L. Supp. 83 (1954).

NOTES

American Indians—status—territorial and property rights

In *Tee-Hit-Ton Indians v. U. S.*, 348 U. S. 272 (Feb. 7, 1955), the U. S. Supreme Court held a group of Indians in Alaska not entitled to compensation for the taking by the United States of timber from land occupied by them. The court said of American Indians:

After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.

War—meaning

In *Sicurella v. U. S.*, 348 U. S. 385 (March 14, 1955), the U. S. Supreme Court held that a Jehovah's Witness who was willing to fight in a "theocratic war" or at Armageddon was not thereby precluded from claiming status as a conscientious objector for purposes of military service.

I.L.O. Convention—maintenance and cure of seamen

An international labor convention, 54 Stat. 1693, was cited by the court in support of its holding that the shipowner is liable for the maintenance and cure of a seaman only until the disease is recognized as incurable. *Desmond v. U. S.*, 217 F. (2d) 948 (2d Cir., Dec. 2, 1954).

Status of France in World War II—neutrality

In *U. S. v. Bussoz*, 218 F. (2d) 683 (9th Cir., Jan. 15, 1955), the court held ineligible to naturalization a French national who in the United States in 1943 applied for relief from United States military service as a citizen of France, which he claimed to be "neutral in the present war." The Director of Selective Service had previously determined France to be a neutral country for purposes of the Selective Service Act. The district court was held to have erred in concluding independently, on the basis of a 1946 letter written by a subordinate official of the Department of State, and historical data in unofficial publications, that France was not neutral in 1943. The court said:

Generally speaking, the Courts have approved the doctrine that the status of foreign countries as regards international relations is for the determination of the political or executive department of the government and not for judicial decision. Only when such determinations are obscure or unclear do the courts undertake the task.

Here the Director of Selective Service had made the determination, "acting for the President *under the Act*."

Effect of U. S. Government order closing foreign consulate on rights of parties under lease

Whether an order of the United States Government that the Hungarian Consulate in New York be closed relieved the Hungarian Government from performing its obligations under a lease of a building for consular purposes, was held to present, under New York law, an issue of fact, namely, "whether the supervening event or circumstance was within the contemplation of the parties at the time of the execution of the lease and might have been anticipated and guarded against." *Hungarian People's Republic v. Cecil Associates, Inc.*, 127 F. Supp. 361 (U.S. Dist. Ct., S.D.N.Y., Jan. 20, 1955).

Treaty of 1848 with Mexico—property of Mexicans in ceded territory

Article VIII of the Treaty of Guadalupe Hidalgo of 1848 with Mexico, whereby Mexicans who acquired in the ceded territory property then belonging to Mexicans not established there were to "enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States," was held not to require the United States to permit a Mexican who had been a member of the Communist Party to remain in the country solely that he might enjoy the occupancy of property within the ceded territory. *Application of Galvan*, 127 F. Supp. 392 (U.S. Dist. Ct., S.D. Calif., Dec. 30, 1954).

Standing of Hungarian residents to sue—"cold war"

In *Pilcher v. Dezzo*, 78 So. (2d) 306 (Jan. 13, 1955, rehearing den. March 10, 1955), the Supreme Court of Alabama rejected the argument that residents of Hungary had no standing in court, being enemy aliens because their country was engaged in a "cold war" with the United States. However, the court expressed sympathy with the idea that the property of a decedent's estate involved should not be transferred to residents of Hungary, though this question did not arise at the present stage of the case.

Treaty of Peace with Italy—tolling of periods of prescription or limitation—workmen's compensation—consuls

In a workmen's compensation case arising from a death which occurred on July 2, 1942, a letter received by the Workmen's Compensation Board between July 11 and 19, 1949, from the attorneys for the Italian Consul General, inquiring on behalf of heirs in Italy as to benefits, was held to be a timely filing of a claim on behalf of the widow living in Italy, the running of the two-year limitation on the filing of claims being tolled for the duration of the war (*i.e.*, until Sept. 15, 1947) by the Treaty of Peace with Italy and by section 27 of the New York Civil Practice Act. It was further held that the seven-year period after the lapse of which awards could be made

retroactive only for two years and only against the Special Fund for Re-opened Cases, rather than the insurance carrier, had also been tolled by the treaty for the duration of the war. *Borelli v. Rochester Transit Corp.*, 136 N.Y.Supp.(2d) 315 (N.Y. Sup. Ct., App. Div., 3d Dept., Dec. 28, 1954).

AMERICAN CASES ON NATIONALITY

Derivative citizenship. Petition of Pellegrini, 126 F. Supp. 742 (U.S. Dist.Ct., S.D.N.Y., Dec. 27, 1954) (required residence—effect of saving clause in Nationality Act of 1940).

Naturalization. U. S. v. Frazer, 219 F.(2d) 844 (U.S.Ct. of App., 9th Cir., Feb. 16, 1955) (moral character); *in re Robertson*, 127 F. Supp. 39 (U.S.Dist.Ct., W.D.Mo., Dec. 20, 1954) (effect of adoption by U.S. citizen); *in re Apollonio*, 128 F.Supp. 288 (U.S.Dist.Ct., S.D.N.Y., Jan. 26, 1955) (eligibility of overstaying seaman who later served in U.S. Army).

Actions to declare citizenship—jurisdiction, procedure and evidence. Wong Ken Foon v. Brownell, 218 F.(2d) 444 (U. S. Ct. of App., 9th Cir., Jan. 8, 1955); *Nevarez v. Brownell*, 218 F.(2d) 575 (U. S. Ct. of App., 5th Cir., Jan. 21, 1955); *Tam Dock Lung v. Dulles*, 218 F.(2d) 586 (U. S. Ct. of App., 9th Cir., Jan. 5, 1955); *Wong Sho Ging v. Brownell*, 218 F.(2d) 910 (U. S. Ct. of App., 9th Cir., Jan. 31, 1955); *Lew Wah Fook v. Brownell*, 218 F.(2d) 924 (U. S. Ct. of App., 9th Cir., Jan. 14, 1955); *Fong Nai Sun v. Dulles*, 219 F.(2d) 269 (Jan. 31, 1955); *Shew v. Brownell*, 219 F.(2d) 301 (U. S. Ct. of App., 9th Cir., Feb. 1, 1955); *Shew v. Brownell*, 219 F.(2d) 413 (U. S. Ct. of App., 9th Cir., Dec. 30, 1954, rehearing den. Feb. 4, 1955, further rehearing den. March 3, 1955); *Mah Toi v. Brownell*, 219 F.(2d) 642 (U. S. Ct. of App., 9th Cir., Feb. 16, 1955); *Yong Hong Keung v. Dulles*, 127 F. Supp. 252 (U. S. Dist. Ct., D. Mass., Dec. 10, 1954); *Ju Shu Cheung v. Dulles*, 16 F.R.D. 550 (U. S. Dist. Ct., D. Mass., Dec. 10, 1954); *Louis Chen Sun v. Brownell*, 127 F. Supp. 684 (U. S. Dist. Ct., E.D.N.Y., Jan. 14, 1955); *Wong Ark Kit v. Dulles*, 127 F. Supp. 871 (U. S. Dist. Ct., D. Mass., Jan. 26, 1955).

Denaturalization. Cufari v. U. S., 217 F.(2d) 404 (U. S. Ct. of App., 1st Cir., Dec. 6, 1954) (insufficiency of evidence); *U. S. v. Minker*, 217 F.(2d) 350 (U. S. Ct. of App., 3d Cir., Dec. 1, 1954, rehearing den. Jan. 6, 1955) (citizen under investigation with a view to institution of denaturalization proceedings not required to appear and testify against himself); *Application of Barnes*, 219 F.(2d) 137 (U. S. Ct. of App., 2d Cir., Jan. 10, 1955) (subpoenas issued to compel appearance of citizens under investigation with a view to their denaturalization); *Garcia Laranjo v. Brownell*, 126 F. Supp. 370 (U. S. Dist. Ct., N. D. Calif., Nov. 10, 1954, as amended Nov. 30, 1954) (effect of denaturalization proceeding without service on defendant; presumption of expatriation through residence abroad under the Act of 1906); *U. S. v. Polites*, 127 F.Supp. 768 (U. S. Dist. Ct., E. D. Mich., Aug. 13, 1953); *U. S. v. Chruszczak*, 127 F.Supp. 743 (U. S. Dist. Ct., N. D. Ohio, July 9, 1954).

Expatriation. Elizarraraz v. Brownell, 217 F.(2d) 829 (U. S. Ct. of App., 9th Cir., Dec. 21, 1954) (voluntary service in Mexican police for which only Mexican citizens were eligible).

AMERICAN CASES ON ENEMY PROPERTY CONTROLS

Albert v. Brownell, 219 F.(2d) 602 (U. S. Ct. of App., 9th Cir., June 30, 1954, rehearing den. Feb. 14, 1955); *Kuerschner & Rauchwarenfabrik v. Swiss Bank Corp.*, 126 F. Supp. 669 (U. S. Dist. Ct., S.D.N.Y., Dec. 21, 1954); *Kuerschner & Rauchwarenfabrik v. New York Trust Co.*, 126 F. Supp. 684 (U. S. Dist. Ct., S.D.N.Y., Dec. 13, 1954); *Algemeene Kunstzijde Unie, N. V. v. U. S.*, 126 F. Supp. 916 (U. S. Dist. Ct., W.D.N.C., Dec. 31, 1954); *Uebersee Finanz-Korporation v. Brownell*, 127 F. Supp. 43 (U. S. Dist. Ct., Dist. of Col., Dec. 20, 1954); *Brownell v. South Pittsburgh Savings and Loan Association*, 127 F. Supp. 783 (U. S. Dist. Ct., W. D. Pa., Jan. 21, 1955); *Brownell v. La Salle Steel Co.*, 128 F. Supp. 548 (U. S. Dist. Ct., D. Del., Feb. 4, 1955).

European Coal and Steel Community—High Court of Justice—High Authority—interpretation of treaty—misuse of power—departure from published tariffs

On December 21, 1954, the High Court of Justice of the European Coal and Steel Community decided the first two cases brought before it. France and Italy contended that the High Authority, by its decisions permitting certain departures from the published tariffs of prices and conditions of sale of steel, violated Article 60 of the treaty (which forbids discrimination) and committed a misuse (*détournement*) of power. The Court upheld the decisions of the High Authority except for a provision which permitted an average departure of up to 2½% from the published tariffs, which it regarded as a violation of the treaty, construing the latter as requiring the publication of exact prices. This provision was annulled by the Court. *The Government of the French Republic v. The High Authority*, 4 Journal Officiel de la Communauté Européenne du Charbon et de l'Acier 547 (January 11, 1955); *The Government of the Italian Republic v. The High Authority*, *ibid.* at 560.

Foreign revenue laws—Commonwealth of Nations

The House of Lords, affirming a decision previously noted here,¹ held that a claim of the Government of India for taxes due under its law was unenforceable in English courts. *Government of India v. Taylor*, [1955] 2 W.L.R. 303 (Jan. 20, 1955).

Belligerent occupation—discharge of pre-occupation debt—Malaya

A pre-occupation debt in Malaya was held effectively discharged by payments during Japanese occupation before Dec. 31, 1943. *A.M.K.M.K. v. Chettiar*, [1955] 2 W.L.R. 213 (Privy Council, Jan. 11, 1955).

¹ *Re Delhi Electric Supply & Traction Co., Ltd.*, 48 A.J.I.L. 513 (1954).

the meaning of the Civil Procedure Ordinance of the Federal Republic, but should, in effect, be treated as such for the purpose of providing redress for an inhabitant of the Federal Republic whose debtor lives in the Democratic Republic (Federal Court (*Bundesgerichtshof*), Nov. 24, 1951, *ibid.* at 829). The Convention of Petersberg of November 22, 1949, between the Federal Chancellor and the Allied High Commission was not a treaty with foreign states under Art. 59 of the Fundamental Law of the Federal Republic, but an agreement with the joint organ of the occupying Powers which cannot be assimilated to a foreign state. Germany had become a party to the Convention of April 22, 1946, on an International Authority of the Ruhr, by the action of the occupying Powers themselves (Federal Constitutional Court, July 29, 1952, *ibid.* at 831). Under international law and German law the territory east of the Oder-Neisse line, though under provisional Polish administration, is still German (Superior State Ct. of Celle, Dec. 3, 1951, *ibid.* at 841). Inhabitants of the Saar who were German nationals in 1945 are still German (Admin. Ct. of Aachen, June 3, 1952, *ibid.* at 843). Even though the annexation of Czechoslovak territory in March, 1939, was contrary to international law, it does not follow that the accompanying legislation conferring German nationality on certain inhabitants of the annexed territory had no effect. Such persons retain German nationality, at least if they continue to claim it (Federal Constitutional Ct., May 28, 1952, *ibid.* at 845). However, a Sudeten German who acquired German nationality by collective naturalization, but after the war indicated by his conduct his desire to abandon it, is not entitled to be treated as a German (*Case of Rubesch*, Federal Constitutional Ct., Dec. 12, 1952, *ibid.* at 849).

For notes on Swiss decisions and acts bearing on the status and treaties of Germany and Austria, see 10 *Schweizerisches Jahrbuch für Internationales Recht* 204-211, 237, 249-252 (1953).

Prize law—Treaty of Peace with Italy—revision of Italian prize court decisions—neutral goods—enemy destination—presumptions

The Italian Council of State (Special Section for Revision of Judgments of Prize Tribunals), acting under Annex XVII (A) to the Treaty of Peace of 1947, reversed a decree of July 25, 1941, whereby goods of a neutral owner found on board an Italian vessel had been condemned as enemy goods on the ground that enemy destination created a presumption of enemy character. The Council of State held that under the Treaty of Peace it was empowered to consider the merits of the prize decisions under review, and not merely to comply with the "recommendations" of Allied Powers after ascertaining their formal regularity. However, it found no justification in international law or Italian law for the presumption applied by the Italian prize court in 1941. *Case of van Beek*, April 16, 1953, 37 *Riv. di Dir. Int.* 369 (A note by Conforti is appended).

Occupation—Trieste—sovereignty—courts—Treaty of Peace with Italy—Hague Regulations

It was held that under the Treaty of Peace of 1947 the Free Territory of Trieste remained under Italian sovereignty while under provisional Allied administration, and the Allied authorities exceeded their powers as occupants under Art. 43 of the Hague Regulations in setting up a Special Section for Cassation Recourse. Consequently, a judgment of the Trieste Court of Appeal pronounced after the case had been remanded to it by this Special Section was void. *Case of Solazzi and Pace*, 37 Riv. di Dir. Int. 387 (Italy, Ct. of Cassation (Penal), Oct. 12, 1953).

Belligerent occupation

In *Conservatorio Cherubini di Firenze v. Saba*, 37 Riv. di Dir. Int. 366, the Italian Court of Cassation (United Civil Sections) held, on Feb. 22, 1954, that the Allied military authorities in Italy during the war did not have the power to annul a valid contract, since, with certain exceptions, a belligerent occupant has no greater powers of control with respect to the administrative activity of the organs of the occupied state than the occupied state itself has under its laws.

The record of a conviction by a German military court in Athens was ordered expunged on the ground that the judgment, although valid when pronounced, automatically lost force with the end of German occupation. *Case of A.B.*, 6 Rev. Hellénique de Droit Int. 278 (Greece, Ct. of First Instance of Thebes, 1951).

For the concluding part of an article by Tenekides on Greek decisions on belligerent occupation, see 81 Clunet 636 (1954).

Confiscation—Treaty of Peace with Italy—optants—agreement between Italy and Yugoslavia—succession of states—nationality

An inhabitant of territory ceded by Italy to Yugoslavia who opted for Italian nationality was held entitled, in the light of various international agreements, to a ship held by the Italian Government which a Yugoslav court had purported to confiscate. *Luzardo v. Ministry of Merchant Marine*, 37 Riv. di Dir. Int. 390 (Italy, Ct. of Appeal of Ancona, Nov. 25, 1953).

For a case involving the effect of territorial changes during and after World War II and the Treaty of Peace on the nationality of a person born in Yugoslavia and residing in Italy, see *Kozuh v. Mayor of Milan*, Giurisprudenza Italiana, 1952, I, Sec. 2, p. 451 (Ct. of Appeal of Milan, March 18, 1952).

Consulates—lack of extritoriality—contracts

A contract made in a foreign consulate in Italy was held made in Italian territory, since consulates have no extritoriality. *Coppello v. Ufficio Federcrale*, 37 Riv. di Dir. Int. 404 (Italy, Ct. of Appeal of Genoa, Nov. 19, 1952).

Munich Agreements of 1938—effect—nationality of Sudeten Germans

In *Het Nederlands Beheerinstituut v. Johanna Cornelia van Nimwegen and Georg Manner*, Nov. 18, 1952, the Court of Appeal of Arnhem, Netherlands, held that the Munich agreement of 1938 and the German-Czechoslovak treaty based on it, whereby the Sudetenland was ceded to Germany, created a situation which must be taken into account in passing on the nationality of a Sudeten German. Postwar Czechoslovak law recognized the German nationality of Sudeten Germans. The court did not decide, therefore, whether an agreement and treaty resulting from the use of force were to be regarded, under international law, as null and void. *Nederlands Tijdschrift voor Internationaal Recht*, 1953-1954, p. 89.

Potsdam Agreements—Soviet measures in Germany—effect on trade-marks

The effect of the Potsdam Agreements and Soviet confiscatory measures in Germany on rights to a trade-mark belonging to a German company, whose seat was originally in the Soviet Zone, was considered in *Administration des Domaines v. Établissements Sidney-Merlin*, 43 *Revue Crit. Droit Int. Privé* 122 (1954) (Ct. of App. of Paris, France, March 21, 1953).

Road Traffic Convention of 1949

The effect of the Geneva Road Traffic Convention of 1949 in Netherlands law was considered in two decisions of the Netherlands Supreme Court, *Nederlands Tijdschrift voor Internationaal Recht*, 1953-1954, pp. 328-330.

Treaties—effect in Greek law

The Greek Council of State said that a decree-law of general application providing for the expropriation of rural properties would, in view of the clear legislative intent, prevail over pre-existing treaties in Greek law, but found no inconsistency between the decree-law and the treaties invoked in opposition to its application. Decision No. 1829/1953 (Plen.), 6 *Rev. Hellénique de Droit Int.* 390 (1953).

Rhine navigation jurisdiction—treaties—violation—effect of war—military government

In a suit commenced in November, 1948, growing out of a collision on the Rhine on April 1, 1946, near the boundary between the American and French Zones of Occupation in Germany, the Court of First Instance of Rotterdam, Netherlands, held that it lacked jurisdiction, since the Revised Mannheim Convention of 1868 had been restored to full force by the occupying Powers which then exercised German sovereignty. In 1946 and 1947 these Powers set up courts to perform the functions of the navigation courts under the convention; these courts were open when the present suit was commenced. There was no reason, therefore, for the Netherlands courts to exercise the temporary jurisdiction they assumed after the denunciation

of the convention and the dissolution of the German navigation courts by the German Government in 1936. The court added that the convention at that time remained in force as between the other parties, but could no longer be observed with regard to Germany, the provisional exercise of Netherlands jurisdiction being then fully justified by Germany's illegal acts. As between Germany and The Netherlands, moreover, the convention was suspended by the outbreak of war in 1940, but the suspension ended in the autumn of 1945. *N.V. Nederlandsche Rijnvaartvereniging v. N.V. Damco Scheepvaart Maatschappij*, Jan. 14, 1954, *Nederlands Tijdschrift voor Internationaal Recht*, 1953-1954, p. 331. See also, *Swiss Corp. Tanutra v. N.V. Nederlandsche Rijnvaartvereniging*, April 17, 1953, *ibid.* at 89; and *Willem Geervliet v. Belgian Corporation Scheepswerf de Durme N.V.*, *ibid.* at 430 (in which it was also held, after an extensive review of the question and of the preparatory work of the Mannheim Convention, that it was proper for a Netherlands Rhine navigation court to take jurisdiction, with the consent of the parties, over a case which would normally fall within the jurisdiction of another Netherlands Rhine navigation court).

BOOK REVIEWS AND NOTES

International Law: A Treatise. By L. Oppenheim. Vol. I: *Peace*. (8th edition; ed. by H. Lauterpacht.) London, New York, Toronto: Longmans, Green, and Co., 1955. pp. lvi, 1072. 90 s.

Fifty years ago Lassa F. L. Oppenheim published in two volumes *International Law: A Treatise*, "intended to present international law as it is, not as it ought to be." The book was at once accepted as the clearest, most cogent and accurate statement of the subject at the time. The Whewell Professor of Cambridge University died in 1919 in the midst of preparing a third edition, which was finished by Ronald F. Roxburgh in 1920-21. Arnold McNair listed in the preface of the fourth edition in 1926-29 the 50 or more sections he had added or altered. In 1935-37 Hersch Lauterpacht did a fifth edition, exercising greater freedom with Oppenheim's text. In April, 1955, Lauterpacht, who left the Whewell chair at Cambridge in February for a judgeship on the International Court of Justice, brought out an eighth edition of the "Peace" volume which contains "only one third—or less" of the original author's text. Since the fourth edition this JOURNAL has called attention to the anomaly of "editors" putting out their own ideas under the pseudonym of Oppenheim (Wilson, Vol. 21, p. 397; Déak, Vol. 32, p. 622, and Vol. 35, p. 403; Finch, Vol. 44, p. 784; Fenwick, Vol. 47, p. 84). Mr. Lauterpacht in the present preface refers to the "exhortations" that he should assume full responsibility for a treatise, but "so long as the demand for 'Oppenheim' continues" he has "not felt justified in abandoning" it.

Judge Lauterpacht might consider how other standard works have been kept alive. There was Henry Wheaton's *Elements of International Law*, three editions of which were issued by the author before his death in 1848; William Beach Lawrence, Richard Henry Dana and George Grafton Wilson issued six more editions in 1863, 1866 and 1936, each of which is known as "Lawrence's Wheaton," etc.; there were also seven English editions. In France Henry J. F. X. Bonfils did a *Manuel de Droit international public (Droit des gens)* in 1894; after his death Paul Fauchille did a second edition in 1898, followed by five up to 1914. In 1922-26 Fauchille brought out his four volumes of *Traité de droit international public*, modestly claiming it only as an eighth edition of Bonfils. In both cases there was no confusion between the work of the master and the apprentice.

The obvious justification for perpetuating "Oppenheim" or any other standard work in posthumous revisions is that the qualities of the original should be preserved in treating new material according to the standards and methods of the master. Neither Wheaton nor Bonfils was submerged

or suppressed by their subsequent editors. A case can be made for the contention that Oppenheim has been, and that consequently "Oppenheim" is now just a trade name. If the characteristics of the Oppenheim of 1905, 1912 or 1920-21 are discernible and developed in the "Oppenheim" of 1955, as the principles of the wall telephone of 1905 have evolved into the dial instrument of 1955, a trade name in learning is as legitimate as is one in industry.

Simple clarity and definite statement of principles and rules were the features of the living Oppenheim, whose citation of supporting facts was notably precise. He knew the Covenant but no action of the League of Nations. All developments since 1920 (third edition) have been at the discretion of the editor. (Disputes since the fourth edition have been in the second volume with War and Neutrality.) The eighth edition, compared with the third, shows 581 sections as against 596, all titles virtually the same but bulking almost 300 more pages. However, 66 sections are omitted (with much substance transferred) and there are 178a sectional additions, principally devoted to states and territory, equality, state responsibility, League of Nations, United Nations, International Labor Organization, minorities, human rights. Oppenheim's framework, including section titles, has been quite faithfully preserved.

The positivism of Oppenheim, which was largely a reversion to Justinian jurisprudence if custom and treaty law were lacking, is superseded by the much larger amount of factual evidence now available and a comprehensive exploration of theory. The revamping of Oppenheim's chapter bibliographies has been an elaborate substitution of new monographs for older ones; possibly half of all citations are post-Oppenheim. Reading the text, the eighth edition in flavor and thought sounds much like the third, though it may occupy only half of the page. Oppenheim did not ordinarily debate theories or alternatives in either text or footnotes, which for him were primarily citations of sources or authority. Easily 40% of the eighth edition's pages is occupied by footnotes that constitute over half of the wordage of the book. Over 800 cases are cited with unusual pertinency.

Judge Lauterpacht has put out this eighth edition of "Oppenheim" because the profession uses the book. The reasons for that use are only in part traceable to Oppenheim, his clarity in stating a rule and its limitations. They are rather to be found in the fact that "Oppenheim" is now regarded as a comprehensive compilation of rule, theory, authority and source, accurately enough stated for immediate quotation, definite enough in references to available material to enable any one to go forward in an investigation of a thesis, whether the question to be answered is one in a foreign office, a court, or a class room. The Whewell Professor at Cambridge provided much the same service in 1905. His successor persists in the English habit of sticking to the firm name whoever runs the shop. But it must be said that the book serves its purpose.

DENYS P. MYERS

Legal Controls of International Conflict. By Julius Stone. New York: Rinehart & Co., 1954. pp. vi, 852. Appendix. Index. \$12.00.

This important contribution to the literature of international law has a novel structure. Professor Stone, well known for his writings in legal philosophy and international law, explains in his preface his attempt to "narrow the chasm between the law on paper and the conduct of states." The main purpose of the book is "to integrate with the literary systematics and social status of international law, a coherent examination of the unstable dynamics of its operation in a world of travail." The device used is to confine systematic exposition within the chapters and to follow these expositions with sections called "Discourses" wherein the author examines critically "the forces which threaten the system with change and breakdown." The expository chapters themselves present wide variances from exhaustively annotated and closely reasoned monographs to rather elementary recitals of standard propositions and familiar facts. The ensemble reveals great erudition, a sound jurisprudential base, imagination, and highly perceptive analysis and prognosis. A good style and flashes of wit and humor help the reader through the 765 pages of text (including the important Introduction.)

Book I is a concise history of the growth of international law and of the various theories and doctrines concerning its nature. Discourse number 12 concluding this Book is on "Soviet and Western Approaches to International Law."

Book II deals with the peaceful settlement of disputes and coercive methods short of war. Here one finds discussion of League of Nations and United Nations techniques. When one reads here in Chapter VIII (p. 211) the legal conclusion that the absence of a permanent member of the Security Council cannot be considered as equivalent to an abstention, one needs to read also Discourses 9-11 to get the full flavor of the author's thought. It seems curious, in the light of Professor Stone's general point of view, that he apparently attributes little weight to actual practice in United Nations organs. He seems to fall into the practice of "ingenious manipulation of ambiguous texts" for which he gently criticizes Kelsen (p. 272). As he says elsewhere (p. 276) "brilliant textual exegesis is no substitute for accurate history." The reviewer would question the accuracy of his conclusions (pp. 278-9) regarding the absence of consideration of League experiences in the efforts to set up the United Nations in 1945, although it may well be argued that the "Forty-fivers" did not profit from the earlier experience.

Book III is on War and Neutrality. Its more than four hundred pages constitute a very useful treatise on these subjects with adequate exposition of the traditional law and the types of treatment in the Discourses which by now are familiar to the reader. One may signalize the eloquent plea on page 351 that the law of war should not be abandoned in the intensity of the effort to bring about the total abolition of war. His defense of the Nuremberg trials (Discourse 20) is effective, as for instance the statement: "If, then, the rules applied at Nuremberg were not previously rules of

positive international law, they were at least rules of positive ethics accepted by civilised men everywhere, to which the accused could properly be held in the forum of ethics."

In general through this Book III, the treatment of economic warfare in its relation particularly to the law of neutral rights and duties is a most useful contribution, as for example Discourse 24, analyzing the effect on the law of neutrality of the increase in state trading. See also Discourse 30 for its discussion of the errors of Captain Mahan. On the other hand some generalizations seem to be so exclusively based on the history of United States-European relations as to be deprived of global validity.

On page 528 and in Discourse 28 one finds a brief but interesting analysis of the old question whether prize courts actually apply international law as such. The treatments of new problems in warfare such as those created by new weapons and air developments and the status of "unprivileged belligerency" (Major R. R. Baxter's term which Stone adopts) are helpful leads in fields where the older literature can contribute little. Discourse 32 on postwar repatriation of unwilling prisoners will not be agreed to by all, but it properly stresses the need for clarification of the 1949 convention.

On all the subjects it treats and on many which are not obviously included under the title and chapter headings, this volume is an extremely useful reference book both for the author's views and for the guide to the literature which the footnotes afford.

PHILIP C. JESSUP

Teoría de la Guerra en Francisco Suárez. 2 vols. By Luciano Pereña Vicente. Madrid: Instituto Francisco de Vitoria, 1954. pp. xvi, 333; 355. Indices.

The book under review, honored by the Menéndez Pelayo Prize, is a scholarly investigation, built on years of work in the archives of many Spanish and Portuguese cities and making use of the whole existing literature. It is based on many new documents, hitherto unpublished, and reaches new results. The second volume gives a critique of the printed editions and manuscripts of Suárez' *Disputatio XIII de Bello*, the text (in Latin and Spanish) as well as the text of citations, related to the theory of war, from all the other works of Suárez. The first volume is dedicated to a critical analysis of Suárez' theory of war.

A study of this work shows again how fundamentally different the Catholic theory of *bellum justum* is from the theory of *bellum legale*, underlying the Pact of the League of Nations and the Charter of the United Nations. The author wants to bring out the differences of Suárez' theory, as compared with that of the other writers of the Spanish Neo-Scholastic School.

Suárez, theologian, S.J., is, like all the other Spanish Neo-Scholastics, still in deep connection with the Middle Ages and Catholic natural law—very different from Grotius. But he is more modern than the other Spanish Neo-Scholastics. He fully recognizes the definitive end of medieval

unity, the pluralism of sovereign states. Living in a period of crisis not unsimilar to the present one, he tries, although recognizing modern developments, to save the eternal values of the Middle Ages out of the shipwreck. Hence his fundamental attitude that mankind, although divided into nations, has still an even quasi-political unity.

On the other hand—and that is the author's principal new contribution—Suárez is not only a Jesuit, but a highly Spanish Spaniard of the Golden Century, who intensively lived the imperial mission of Spain. His theory of war is a political theory: he is the theoretician of imperial Spain, the defender of Philip II before the tribunal of history, just as the work of the Italian Protestant Albericus Gentilis is a defense of the policy of Elizabeth of England. His political theory of war is—in the words of the author—a dialectical synthesis of the political thesis of Macchiavelli and the juridical antithesis of Francisco de Vitoria. For him, living in a period of crisis, it is the imperial mission of Spain to defend Catholicism and justice, in order to lay the foundations for European unity and culture. His most important ideas are the unity of mankind and the dynamic peace, based on justice, friendship and charity.

It is the great event of the Spanish conquest of Portugal which influenced his doctrine, led to its politicization and made it different from that of Vitoria. This politicization is, first of all, seen in Suárez' "probabilism," so sharply attacked by modern Neo-Thomists. If the *justa causa* is doubtful, the king is bound to have his title investigated by experts; but it is for him to choose his experts, for him to determine which of differing opinions he wants to follow, for him alone to make the decision. If he reaches the conviction of the greater probability that the right is on his side, he can go to war, as a judge in a criminal procedure. It is this doctrine of "greater probability" and of subjective appreciation which constitutes the politicization of the doctrine. There is a further point: Suárez distinguishes the *bellum justum* from the "*bellum licitum*": even if the king is convinced of his greater right, he may go to war only if he has hope to win; he must not have, as Cayetano asked, "the moral certainty of victory," but, at least, "more probable hope." There is one exception: if the injury by the enemy was a violation of the honor of Spain, the king must go to war, even if there is a probability of defeat. Sixteenth-century Spain: "*el honor*." We are here in theology exactly where we are in the dramas of Calderón de la Barca: without honor there is no sense in living.

The author holds that Suárez' concrete theory of war cannot help us today, because it is too much time-and-nation bound (Catholicism, absolute monarchy, exalted feeling of national honor). But his general principles—unity of mankind, dynamic peace, based on justice, friendship and charity—may very well contain the directives for overcoming the tragic crisis of our own days.

JOSEF L. KUNZ

Treatment of British Prisoners of War in Korea. By the Ministry of Defense. London: H. M. Stationery Office, 1955. pp. 41.

In publishing this report on the treatment given to 978 British prisoners of war in Korea by their Communist captors, the British Government has rendered an invaluable service to the cause of freedom, as well as to the proper understanding of the methods and operations of international Communism. The report describes with restraint, not lacking in part a tone of tragedy and a touch of humor, the brutal and cruel treatment of which these prisoners were victims, a treatment that in many instances amounted to murder and in others to an unbelievable degree of sadism.

In view of the practically negative results obtained by the Communists, it can truly be stated that their "*persuasion*" methods proved to be a complete failure in "*re-educating*" the prisoners and that, therefore, the record is one more testimony to the stamina and heroic valor of the British people.

The behavior of the Chinese Communists towards their prisoners underlies the rôle played by propaganda in contemporary warfare. For the first time in modern history, there were army men of British nationality, who, after falling into enemy hands, found that their capture was the beginning of a personal struggle much more difficult and inhuman than the one in which they had been engaged on the battlefield. The fact that these prisoners were totally unprepared for their new ordeal points also to the necessity of providing adequate information in the social sciences as well as in brainwashing techniques to those who will encounter actions of this kind in the future.

The aim of the Chinese was to convert to Communism as many of the prisoners as possible for the purpose of using them as propaganda tools throughout the world. The methods ranged from personal indoctrination, including all forms of teaching devices, such as films, recordings, plays and stage shows, to sheer repetition and drill geared to instill in the minds of the prisoners all of the Communistic slogans. At the same time, the application of Pavlov's conditioned reflex theory in its most minute consequences and the offering of rewards such as food and better treatment to those who conformed to the preaching of Communism, were systematically practiced. In this way, an atmosphere of anxiety, insecurity and fear was created and under it the process of conversion became the only possible form of escape from the most unendurable tortures. Of a more refined cruelty were the measures of maneuvering with the mail of the prisoners, sentencing to solitary confinement, and the denial of vitally needed medicines to force the prisoners to "*co-operate*." All these form part of a picture that would easily compare with Dante's *Inferno*.

The description of the treatment given to an American officer, which seems to be the typical way in which most of the prisoners were treated, may be quoted here as documentary:

. . . He was kept in solitary confinement for three weeks. During his confinement, he was savagely beaten and tortured. When he returned to the compound he was morally and physically broken. He

told the other officers never to discuss anything in his presence as he had been sent back to act as an informer and threatened with worse torture if he did not comply. His treatment had left him very weak and he no longer had any will to live . . . and he eventually died about two weeks after his release.

The methods used by the Communists all over the world to apply pressure by threatening the dearest relatives of their victims, were also employed to the utmost extent in Korea. The British prisoners were repeatedly told of possible harm that would come to their relatives at home should they refuse to co-operate, and in turn, their relatives in England were also approached by Communist agents to obtain from them either certain types of letters to be addressed to the prisoners, or to force them to take public stands favorable to the Communist "peace campaign," or other similar objectives.

From the viewpoint of international law, the Prisoners of War Convention drawn up at Geneva in 1949, and in which representatives of the Soviet Union participated, was totally and completely violated by the Communists in spite of the fact that they claimed, as usual, to be abiding by it. It is interesting to note, however, that frequently the Communists spoke with contempt of the provisions of the convention. They termed their methods of dealing with the prisoners a better procedure and named it the "Lenient Policy." On the other hand, such a policy has been recognized by the Communists themselves as one applicable not to prisoners of war but to "war criminals." The experience of the Korean War seems to indicate that some form of supervisory control must be established in order to guarantee the fulfillment of the norms established by the Geneva Convention and make them in reality the guiding pattern for treatment of prisoners of war in future emergencies.

To the record of gallantry of practically all of the British prisoners, as it appears in this report, can be applied the praise given in the citation of the "George Cross" awarded to one of them, Lieutenant Terrence Edward Waters of the West Yorkshire Regiment, who died as a prisoner in Korea in April, 1951: "It sets a magnificent example of courage and fortitude."

JOSÉ MARÍA CHAVES

Counselor, Embassy of Colombia

Instrumentos Internacionales: Aspectos jurídicos y aportes de la diplomacia. By Aldo Armando Cocca. Cordoba, Argentina: Imprenta de la Universidad, 1953. pp. 80.

Personnalité juridique internationale et Capacité de conclure des Traités de l'O.N.U. et des Institutions spécialisées. By Jean Carroz and Yürg Probst. Paris: Imprimerie R. Foulon, 1953. pp. 90.

Señor Cocca, who is an officer of the Argentine Ministry of Foreign Affairs and Culture, has done a useful brochure on treaty technique, form and characteristics. It is well to have so compact and accurate a book in Spanish, for the Latin Americans have been as careless as anybody

else in observing the formalities attending the making, consummating and execution of treaties. Señor Cocca's pages are primarily expository, clear and definite in digesting both experience and authorities. But he finds space to discuss some of the debated questions such as the legal effect of signature, alone or followed by ratification, and the value of exchanges of notes, which he concludes are international agreements. He finds *rebus sic stantibus* a reality in bilateral treaties and wisely suggests that the proper unilateral action is denunciation. The sections on reservations, guaranties and the most-favored-nation clause are as objective as those on the technical steps in treaty-making. Altogether this is a good monograph.

Messrs. Carroz and Probst feel that they are in an area "where all mythology is far from being abolished" and put out a sketch of an anticipated more complete work. Here they conclude that capacity to conclude treaties "is not a *sine qua non* function of international personality." The authors review the arguments as to whether Article 104 of the Charter invests the United Nations with international juridical personality or simply does not exclude its existence. In their view the United Nations and its specialized agencies are distinct entities, invested with specific international competences as regards members and third states. The extent of the international juridical personality is determined by principles of specialization, efficacy and independence. The "international objective personality" ascribed to the United Nations by the International Court of Justice in the *Reparation for Injuries* advisory opinion does not mean juridical personality, say the authors. The instruments actually made are scarcely treaties in the ordinary sense, for proof of which the explicit provisions authorizing agreements in Articles 17(3), 43(3), 63, 79 and 105(3) of the Charter are examined, as well as the implicit provisions in Articles 26, 28(3), 32, 53, 64(1), 70 and 93(2).

The United Nations and specialized agencies do make binding engagements. Three theories are examined: The capacity to treat is a condition of international juridical personality, or a consequence of it, or is not simply deducible from it. Our writers look to their principles of speciality and efficacy for an explanation. Assuming that capacity to make treaties stems from international personality, determination of the legal competence of the institution as to the subject-matter is more important than whether a treaty is the adequate means for exercising the competence.

DENYS P. MYERS

Civilization and Foreign Policy: An Inquiry for Americans. By Louis J. Halle. New York: Harper & Brothers, 1955. pp. xxx, 278. Appendix. \$3.75.

The author, once a member of the Policy Planning Staff of the Department of State, has continued his former task of thinking "hard about the problems of our American foreign policy." In an imaginative and challenging volume of eighteen chapters he has conducted an inquiry into "the

lack of an adequate body of theory to guide those who must work upon the practical problems of our foreign policy."

Mr. Halle devotes considerable attention to the world of present-day American foreign policy, our objectives—limited and unlimited—our associates and opposition, power politics and the balance of power. Invoking the muse of history, he has allowed his thoughts to range back into the past, calling the reader's attention to the use of power by many states. Of the United States and the use of power, he states that this Government under its Constitution has "succeeded in organizing power so as to produce a reconciliation of freedom and order which is among the most effective the world has seen." Applied to the kind of world of today, in which a more or less mature America holds a position of leadership, the author concludes that the international relations of states are those of association or opposition. That the powerful, when they respect each other's power, often get along very well together, is his conclusion. In the face of opposing powers, the national self-interest must first hold its own and, second, do so without getting hurt in the process.

In the concluding chapter, "The Practical Test," Mr. Halle applies some of his conclusions to the power opposing the United States of America. We must, in his opinion, limit the Soviet power, making "such limitation the objective of our policy." He distinguishes between "force as a threat or warning and force actively applied." To retain the consent of our allies for our policy of deterring a nuclear attack, "and to preserve ourselves, we must maintain such a posture of force as promises either to prevent a major war altogether or, at least, to make enemy use of nuclear weapons against population centers and industries in a war unlikely." He adds that increased taxation will be needed and industrial facilities now available for the production of many luxuries probably must be diverted to defense production, a material sacrifice of some significance. Thus a sound foreign policy is going to demand both money and a high degree of civic virtue. "This is not beyond our capacity," given the continuing discipline of danger.

This is a book for the serious student and the citizen who is willing to face the unpalatable realities of nuclear warfare. It is an analysis of the burdens of international civilization and a search for general principles of international relations that might have useful implications for action in the world of today.

MARY E. BRADSHAW

Histoire de l'Internationalisme. Christian L. Lange and August Schou. (Publications de l'Institut Nobel norvégien, Tome VII.) The Hague: Martinus Nijhoff; Oslo: H. Aschehoug & Co., 1954. pp. xii, 482.

Christian Lous Lange (1869–1938) was secretary of the Nobel Committee 1900–09, and Secretary General of the Interparliamentary Union thereafter until 1933. He represented Norway at the Second Hague Conference in 1907 and at the Assembly of the League of Nations 1920–1933. The first volume of this work was published in 1919 and at his death

in 1938 he had completed five of the 13 chapters of the present volume and had assembled material for most of the other chapters. The first volume reviews the concept of political organization beyond the nation state from the earliest times to 1648; this volume continues the study from the Treaty of Westphalia to the Congress of Vienna, 1815, and was completed for publication by August Schou for the Nobel Committee. A third volume was planned to bring the record down to the present.

Everybody who knew Lange liked and admired him as a man, an administrator and a diplomat. Publication of the first volume of the History of Internationalism revealed him as a scholar to those who did not know him personally. This second volume confirms that verdict. From Hobbes to Kant some 300 writers from the Age of Absolutism to the Age of Revolutions are identified and their ideas are discussed, whether they are philosophers, publicists, religionists, political figures or *littérateurs*. Scattered through the chapter sections which expose the ideas of this galaxy of writers are summaries of the political aspects of society which together constitute as perspicacious an analysis of the evolution of political thought of the period as can be found. The clarity with which Lange sorts out the thoughts and thoughtlets of a great variety of thinkers enables the reader to comprehend the obscure and turgid as well as the clear and limpid writer. The concrete thought of an epoch thus effectively supports the abstract analysis of the political quality of a stirring period.

DENYS P. MYERS

The Development of International Justice. By Sir Arnold Duncan McNair. New York: New York University Press, 1954. pp. vi, 34. \$2.50.

These two lectures at the Law Center of New York University by the President of the International Court of Justice deal succinctly with the development of tribunals and of the law. He treats the Permanent Court of International Justice and the present Court as one, confirming the common view. The specific questions he discusses are few, but his opinions concerning them are clear. Access to the Court should not be extended to individuals without the intermediation of their governments, but a chamber of the Court might be made a standing claims commission with reference to the full Court of legal issues of general importance. The abolition of *ad hoc* judges appointed by litigant states whose nationality is not represented on the Court may be feasible in the future. Citation of previous decisions "has greatly contributed to the consolidation of the *corpus juris* that is gradually being built up."

On the development of law Sir Arnold reviews with satisfaction the increasing amount of case law that is available, and then considers "codification." He "can foresee no benefit, and some harm, to be derived from any general attempt at the codification of public international law by means of conventions" at this time. On the other hand, "I believe that better progress will be made by means of systematic restatement." The thirteen restatements made by the Harvard Research and reproduced in the JOURNAL (Supplements to Vols. 23, 26, 29 and 33) in 1929, 1932, 1935

and 1939 "have been of great value." Sir Arnold lists nine subjects which *prima facie* demand attention if any unofficial organization should embark on the task. Such work would help the International Law Commission, which must devote much attention to assignments handed it by the General Assembly of the United Nations.

DENYS P. MYERS

United Nations. Repertoire of the Practice of the Security Council 1946-1951. New York: Columbia University Press, 1954. Doc. No. AT/PSCA/1. Sales No.1954.VII.1. pp. 514. \$5.00.

This volume results from Resolution 686(VII) of the General Assembly. It is not, as one might think, part of the preparatory work for the possible Charter review conference; it comes rather from the function of the International Law Commission of "making the evidence of customary international law more readily available." The Secretariat staff who worked upon it were under directions to "avoid taking any position, even in the manner of classifying and presenting the material"; and in the Introduction to the volume, they abjure the posing of theoretical problems not encountered in the actual experience of the Security Council. The work was done under the competent direction of William Jordan.

The Repertoire is a classified, analytical and detailed presentation of what has happened in the Security Council from its beginning; the present volume reaches only to 1952, but it is planned to continue the work and keep it up to date. It will be essential for the delegates for whom it was prepared, and also for any student of the United Nations. It is not a book which one will sit by the fire and read straight through. It does not tell a story, nor carry a thesis; it has no answers and no conclusions. But it contains in its five hundred double-column pages an enormous amount of information, and every item is documented so that it can be run down in the records.

The arrangement is not by articles of the Charter, nor chronological, but by broad types of problems which have been before the Security Council. There are thus twelve chapters, each divided into parts. The first five chapters deal with the procedure of the Council, including voting. There follow chapters concerning relations with other organs; admission of new Members; questions of peace and security, a summary account of each of the twenty-three disputes or situations. Other chapters consider the functions of the Council under Chapters VI and VII and other articles of the Charter. The materials within each chapter are presented as "cases," and these are numbered by chapters. The analysis by classification is detailed and would be confusing but for the explanatory notes at the beginning of each section. There are also an index by articles of the Charter and a subject index, and careful explanations on how to use the volume.

The reviewer has no theme to follow, no conclusions to consider, in these pages; he can only illustrate the possibilities which it has for the reader. A student might wish to know, for example, the record of the

Council with regard to its referral to the Court of questions raised concerning the competence of the Council under the Charter. He would find in the Table of Contents that Chapter VI, "Relations with Other United Nations Organs," has a Part IV concerning the International Court of Justice; he could also look in the subject index for the Court and find three other places in which the matter is considered; he could look in the index by articles for relevant Charter articles; and he could look in the index of Rules of Procedure, but he would find nothing for the Council corresponding to Rule 80 of the General Assembly (which requires immediate vote on a challenge to competence). He would thus arrive at page 231, where the various proposals in the Council for reference to the Court are listed; and in the following pages, he would find each one listed as a "case." The Security Council, it appears, has never yet asked the Court for an advisory opinion, though it once voted to do so.

While practically everything in the volume is related to peace and security—this being the primary responsibility of the Security Council—Chapters VII–XI deal with it in detail. In the first of these chapters the case method is abandoned, and a summary account is given of each question which the Council has handled. This survey is preceded by a list of measures employed by the Council, under eight headings or types, such as Determination of the Nature of the Question, or Measures for Settlement. The next chapter takes up Chapter VI of the Charter, article by article, with relevant "cases" under each. The final chapter considers other articles of the Charter as they were discussed in the Security Council; this includes some twenty-five pages on the domestic jurisdiction clause (Article 2, par. 7).

Mention should be made also of various lists and tables which compactly summarize a great deal of information. At pages 85–91 there is a list of all the matters of which the Security Council has been seized, including retentions and deletions; at pp. 247–257 is a table of applications for membership and all actions taken thereon; at pp. 403–409 is a Tabulation of Questions Submitted to the Security Council, with subheads for Questions Submitted as Disputes, as Situations, under Chapter VII, by Members, by non-Members, by the Secretary General, by the General Assembly, and by the Council of Foreign Ministers. An Analytical Table of Measures Adopted by the Security Council is given at p. 297, by which the successive stages in the consideration of a matter by the Council are given in order, with decisions taken; if one wishes to build up precedents, the opportunity is here provided.

From what has been said above, the reviewer hopes that the value of the volume is made clear. It is not for the person who wishes to know the answers, but for the person who wishes to have the materials from which he can derive his own answers. The materials are in this volume, with citations enabling one to pursue a point to the end of the road. The book is possibly over-organized and might in its next volume be simplified, but not, it is to be hoped, at the cost of losing analysis of materials. It is an exceptional job of objective presentation of factual information.

CLYDE EAGLETON

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(pp. 55-75), H. F. van Panhuys; *Quelques notes sur la Conférence de la Haye de Droit International Privé* (pp. 76-85), M. H. van Hoogstraten.

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1930 sur l'exécution des jugements? (pp. 693-718), Martha Weser; *Existe-t-il un droit international fiscal commun?* (pp. 719-765), Maxime Chrétien.

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Autorità della Comunità Europea del Carbone e dell'Acciaio in materia di disciplina dei prezzi (pp. 66-75), Riccardo Monaco; *Attività imputabile a Stato estero e responsabilità personale dell'individuo-organo* (pp. 84-90), Antonio Malintoppi; *Non eseguibilità in Italia di un sequestro conservativo ordinato da autorità giudiziaria straniera* (pp. 107-113), Giuseppe Sperduti.

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OFFICIAL DOCUMENTS

CONTENTS

	PAGE
AGREEMENTS RELATING TO GERMANY, 1952 AND 1954:	
Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany. <i>Paris, October 23, 1954</i>	55
Convention on Relations between the Three Powers and the Federal Republic of Germany. <i>Bonn, May 26, 1952, as amended at Paris, October 23, 1954</i>	57
Charter of the Arbitration Tribunal	62
Convention on the Settlement of Matters arising out of the War and the Occupation. <i>Bonn, May 26, 1952, as amended at Paris, October 23, 1954</i>	69
Charter of the Supreme Restitution Court	83
Charter of the Arbitral Commission on Property, Rights and Interests in Germany	113
Convention on the Presence of Foreign Forces in the Federal Republic of Germany. <i>Paris, October 23, 1954</i>	120
Tripartite Agreement on the Exercise of Retained Rights in Germany. <i>Paris, October 23, 1954</i>	122
Agreement on the Tax Treatment of the Forces and Their Members. <i>Bonn, May 26, 1952, as amended at Paris, October 23, 1954</i>	123
Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany. <i>Paris, October 23, 1954</i>	126
Protocol No. I Modifying and Completing the Brussels Treaty. <i>Paris, October 23, 1954</i>	128
Protocol No. II on Forces of Western European Union. <i>Paris, October 23, 1954</i>	131
Protocol No. III on the Control of Armaments, with Annexes. <i>Paris, October 23, 1954</i>	134
Protocol No. IV on the Agency of Western European Union for the Control of Armaments. <i>Paris, October 23, 1954</i>	140
ALLIED HIGH COMMISSION. Proclamation. <i>Bonn, May 5, 1955</i>	146
UNITED STATES. Executive Order No. 10608 on United States Authority and Functions in Germany. <i>May 5, 1955</i>	147

AGREEMENTS RELATING TO GERMANY, 1952 AND 1954
PROTOCOL ON THE TERMINATION OF THE OCCUPATION
REGIME IN THE FEDERAL REPUBLIC OF GERMANY

*Signed at Paris, October 23, 1954; in force May 5, 1955*¹

The United States of America, the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Federal Republic of Germany agree as follows:

ARTICLE 1

The Convention on Relations between the Three Powers and the Federal Republic of Germany, the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany,² the Finance Convention,² the Convention on the Settlement of Matters arising out of the War and the Occupation, signed at Bonn on 26 May 1952, the Protocol signed at Bonn on 27 June 1952 to correct certain textual errors in the aforementioned Conventions, and the Agreement on the Tax Treatment of the Forces and their Members signed at Bonn on 26 May 1952, as amended by the Protocol signed at Bonn on 26 July 1952, shall be amended in accordance with the five Schedules to the present Protocol³ and as so amended shall enter into force (together with subsidiary documents agreed by the Signatory States relating to any of the aforementioned instruments) simultaneously with it.

ARTICLE 2

Pending the entry into force of the arrangements for the German Defence Contribution, the following provisions shall apply:

(1) The rights heretofore held or exercised by the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic relating to the fields of disarmament and demilitarisation shall be retained and exercised by them, and nothing in any of the instruments mentioned in Article 1 of

¹ Sen. Execs. L and M, 83d Cong., 2d Sess. (1954), p. 15.

² Not reproduced here.

³ The texts of the five Schedules annexed to the Paris Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany are omitted here, since, in the documents which follow *infra*, pp. 57 ff., the original texts of the Bonn Agreements of 1952 have been revised to incorporate the pertinent provisions contained in the omitted Schedules. See Preface by Senator Walter F. George to the Bonn Agreements of 1952 as amended by the Paris Protocol of 1954, Sen. Doc. 11, 84th Cong., 1st Sess. (1955), p. v. For texts of Bonn Agreements as signed in 1952, see Sen. Execs. Q and R, 82d Cong., 2d Sess. (1952).

the present Protocol shall authorize the enactment, amendment, repeal or deprivation of effect of legislation or, subject to the provisions of paragraph (2) of this Article, executive action in those fields by any other authority.

(2) On the entry into force of the present Protocol, the Military Security Board shall be abolished (without prejudice to the validity of any action or decisions taken by it) and the controls in the fields of disarmament and demilitarisation shall thereafter be applied by a Joint Four-Power Commission to which each of the Signatory States shall appoint one representative and which shall take its decisions by majority vote of the four members.

(3) The Governments of the Signatory States will conclude an administrative agreement which shall provide, in conformity with the provisions of this Article, for the establishment of the Joint Four-Power Commission and its staff and for the organisation of the work.

ARTICLE 3

1. The present Protocol shall be ratified or approved by the Signatory States in accordance with their respective constitutional procedures. The Instruments of Ratification or Approval shall be deposited by the Signatory States with the Government of the Federal Republic of Germany.

2. The present Protocol and subsidiary documents relating to it agreed between the Signatory States shall enter into force upon the deposit by all the Signatory States of the Instruments of Ratification or Approval as provided in paragraph 1 of this Article.

3. The present Protocol shall be deposited in the Archives of the Government of the Federal Republic of Germany, which will furnish each Signatory State with certified copies thereof and notify each State of the date of entry into force of the present Protocol.

IN FAITH WHEREOF the undersigned Representatives duly authorized thereto have signed the present Protocol.

Done at Paris this 23rd day of October, 1954, in three texts, in the English, French and German languages, all being equally authentic.

For the United States of America:

/s/ JOHN FOSTER DULLES

For the United Kingdom of Great Britain and Northern Ireland:

/s/ ANTHONY EDEN

For the French Republic:

/s/ P. MENDES-FRANCE

For the Federal Republic of Germany:

/s/ ADENAUER

CONVENTION ON RELATIONS BETWEEN THE THREE POWERS
AND THE FEDERAL REPUBLIC OF GERMANY

*Signed at Bonn, May 26, 1952, as amended by Protocol on the Termination
of the Occupation Regime in the Federal Republic of Germany,
signed at Paris, October 23, 1954; in force May 5, 1955*¹

THE UNITED STATES OF AMERICA,
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
THE FRENCH REPUBLIC
and
THE FEDERAL REPUBLIC OF GERMANY

HAVE entered into the following Convention setting forth the basis for
their new relationship:

ARTICLE 1

1. On the entry into force of the present Convention the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic (hereinafter and in the related Conventions sometimes referred to as "the Three Powers") will terminate the Occupation regime in the Federal Republic, revoke the Occupation Statute and abolish the Allied High Commission and the Offices of the Land Commissioners in the Federal Republic.

2. The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs.

ARTICLE 2

In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement. The rights and responsibilities retained by the Three Powers relating to the stationing of armed forces in Germany and the protection of their security are dealt with in Articles 4 and 5 of the present Convention.

ARTICLE 3

1. The Federal Republic agrees to conduct its policy in accordance with the principles set forth in the Charter of the United Nations and with the aims defined in the Statute of the Council of Europe.

2. The Federal Republic affirms its intention to associate itself fully with the community of free nations through membership in international organizations contributing to the common aims of the free world. The

¹ Sen. Doc. No. 11, 84th Cong., 1st Sess. (1955), Append. A, p. 129; reprinted from Sen. Execs. Q and R, 82d Cong., 2d Sess. (1952), p. 9, and Sen. Execs. L and M, 83d Cong., 2d Sess. (1954), p. 16.

Three Powers will support applications for such membership by the Federal Republic at appropriate times.

3. In their negotiations with States with which the Federal Republic maintains no relations, the Three Powers will consult with the Federal Republic in respect of matters directly involving its political interests.

4. At the request of the Federal Government, the Three Powers will arrange to represent the interests of the Federal Republic in relations with other States and in certain international organizations or conferences, whenever the Federal Republic is not in a position to do so itself.

ARTICLE 4

1. Pending the entry into force of the arrangements for the German Defence Contribution, the Three Powers retain the rights, heretofore exercised or held by them, relating to the stationing of armed forces in the Federal Republic. The mission of these forces will be the defence of the free world, of which Berlin and the Federal Republic form part. Subject to the provisions of paragraph 2 of Article 5 of the present Convention, the rights and obligations of these forces shall be governed by the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany (hereinafter referred to as "the Forces Convention") referred to in paragraph 1 of Article 8 of the present Convention.

2. The rights of the Three Powers, heretofore exercised or held by them, which relate to the stationing of armed forces in Germany and which are retained, are not affected by the provisions of this Article insofar as they are required for the exercise of the rights referred to in the first sentence of Article 2 of the present Convention. The Federal Republic agrees that, from the entry into force of the arrangements for the German Defence Contribution, forces of the same nationality and effective strength as at that time may be stationed in the Federal Republic. In view of the status of the Federal Republic as defined in Article 1, paragraph 2 of the present Convention and in view of the fact that the Three Powers do not desire to exercise their rights regarding the stationing of armed forces in the Federal Republic, insofar as it is concerned, except in full accord with the Federal Republic, a separate Convention deals with this matter.

ARTICLE 5

1. Pending the entry into force of the arrangements for the German Defence Contribution, the following provisions shall be applicable to the forces stationed in the Federal Republic:

(a) The Three Powers will consult with the Federal Republic, insofar as the military situation permits, with regard to all questions concerning the stationing of these forces. The Federal Republic will, according to the present Convention and the related Conven-

tions, co-operate, within the framework of its Basic Law, to facilitate the mission of these forces;

(b) The Three Powers will obtain the consent of the Federal Republic before bringing into the Federal territory, as part of their forces, contingents of the armed forces of any nation not now providing such contingents. Such contingents may nevertheless be brought into the Federal territory without the consent of the Federal Republic in the event of external attack or imminent threat of such attack, but, after the elimination of the danger, may only remain with its consent.

2. The rights of the Three Powers, heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained, shall lapse when the appropriate German authorities have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order. To the extent that such rights continue to be exercisable they shall be exercised only after consultation, insofar as the military situation does not preclude such consultation, with the Federal Government and with its agreement that the circumstances require such exercise. In all other respects the protection of the security of those forces shall be governed by the Forces Convention or by the provisions of the Agreement which replaces it and, except as otherwise provided in any applicable agreement, by German law.

ARTICLE 6

1. The Three Powers will consult with the Federal Republic in regard to the exercise of their rights relating to Berlin.

2. The Federal Republic, on its part, will co-operate with the Three Powers in order to facilitate the discharge of their responsibilities with regard to Berlin.

ARTICLE 7

1. The Signatory States are agreed that an essential aim of their common policy is a peace settlement for the whole of Germany, freely negotiated between Germany and her former enemies, which should lay the foundation for a lasting peace. They further agree that the final determination of the boundaries of Germany must await such settlement.

2. Pending the peace settlement, the Signatory States will cooperate to achieve, by peaceful means, their common aim of a reunified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic, and integrated within the European community.

3. [Deleted.]

4. The Three Powers will consult with the Federal Republic on all matters involving the exercise of their rights relating to Germany as a whole.

ARTICLE 8

1. (a) The Signatory States have concluded the following related Conventions:

Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany;

Finance Convention;

Convention on the Settlement of Matters Arising out of the War and the Occupation.

(b) The Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany and the Agreement on Tax Treatment of the Forces and their Members signed at Bonn on 26 May 1952, as amended by the Protocol signed at Bonn on 26 July 1952 shall remain in force until the entry into force of new arrangements setting forth the rights and obligations of the forces of the Three Powers and other States having forces in the territory of the Federal Republic. The new arrangements will be based on the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, signed at London on 19 June 1951, supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic.

(c) The Finance Convention shall remain in force until the entry into force of the new arrangements negotiated in pursuance of paragraph 4 of Article 4 of that Convention with other member Governments of the North Atlantic Treaty Organization who have forces stationed in the Federal territory.

2. During the transitional period provided for in paragraph 4 of Article 6 of Chapter One of the Convention on the Settlement of Matters Arising out of the War and the Occupation, the rights of the three Signatory States referred to in that paragraph shall be retained.

ARTICLE 9

1. There shall be established an Arbitration Tribunal which shall function in accordance with the provisions of the annexed Charter.

2. The Arbitration Tribunal shall have exclusive jurisdiction over all disputes arising between the Three Powers and the Federal Republic under the provisions of the present Convention or the annexed Charter or any of the related Conventions which the parties are not able to settle by negotiation or by other means agreed between all the Signatory States, except as otherwise provided by paragraph 3 of this Article or in the annexed Charter or in the related Conventions.

3. Any dispute involving the rights of the Three Powers referred to in Article 2, the first two sentences of paragraph 1 of Article 4, the first sentence of paragraph 2 of Article 4 and the first two sentences of para-

graph 2 of Article 5, or action taken thereunder, shall not be subject to the jurisdiction of the Arbitration Tribunal or of any other tribunal or court.

ARTICLE 10

The Signatory States will review the terms of the present Convention and the related Conventions

(a) upon request of any one of them, in the event of the reunification of Germany, or an international understanding being reached with the participation or consent of the States parties to the present Convention on steps towards bringing about the reunification of Germany, or the creation of a European Federation; or

(b) in any situation which all of the Signatory States recognize has resulted from a change of a fundamental character in the conditions prevailing at the time of the entry into force of the present Convention.

In either case they will, by mutual agreement, modify the present Convention and the related Conventions to the extent made necessary or advisable by the fundamental change in the situation.

ARTICLE 11

1. [Deleted.]

2. [Deleted.]

3. The present Convention and the related Conventions shall be deposited in the Archives of the Government of the Federal Republic of Germany, which will furnish each Signatory State with certified copies thereof and notify each such State of the date of the entry into force of the present Convention and the related Conventions.

IN FAITH WHEREOF the undersigned representatives duly authorized thereto by their respective Governments have signed the present Convention.

Done at BONN this twenty-sixth day of May, 1952, in three texts, in the English, French and German languages, all being equally authentic.

For the United States of America:

signed: DEAN ACHESON

For the United Kingdom of Great Britain and Northern Ireland:

signed: ANTHONY EDEN

For the French Republic:

signed: ROBERT SCHUMAN

For the Federal Republic of Germany:

signed: ADENAUER

ANNEX A TO THE CONVENTION ON RELATIONS BETWEEN THE THREE POWERS
AND THE FEDERAL REPUBLIC OF GERMANY

DECLARATION OF THE FEDERAL REPUBLIC ON AID TO BERLIN (EX. Q, 82D
CONG., 2D SESS., PP. 14-15, AS AMENDED BY SCHEDULE I IN EX. L, 83D
CONG., 2D SESS., P. 20; SEE ANNEX TO LETTER NO. X, PP. 107-109 IN
EX. L)

[Deleted.]

ANNEX B TO THE CONVENTION ON RELATIONS BETWEEN THE THREE POWERS
AND THE FEDERAL REPUBLIC OF GERMANY

CHARTER OF THE ARBITRATION TRIBUNAL¹

PART I—COMPOSITION, ORGANISATION AND SEAT OF THE TRIBUNAL

ARTICLE 1

1. The Tribunal shall be composed of nine members who shall have the qualifications required in their respective countries for appointment to the highest judicial offices or shall be lawyers of recognized competence in international law.

2. The nine members of the Tribunal shall be appointed as follows:

(a) Three members appointed by the Governments of the Three Powers, one by each Government;

(b) Three members appointed by the Federal Government;

(c) A President and two Vice-Presidents (hereinafter referred to also as "the neutral members") appointed by agreement between the Governments of the Three Powers and the Federal Government, none of whom shall be a national of any one of the Three Powers or a German national.

3. The Governments of the Three Powers and the Federal Government shall make known their first appointments not later than sixty days after the entry into force of the present Charter. Within the same period the Governments of the Three Powers and the Federal Government shall agree upon the three neutral members, one of whom shall be nominated as President and the other two as Vice-Presidents. If, after the expiry of such period, one or more of the neutral members shall not have been agreed upon, either the Governments of the Three Powers or the Federal Government may request the President of the International Court of Justice to nominate such neutral member or members.

4. Appointments to fill vacancies shall be made in the same manner as the appointment of the member to be replaced. However, if a vacancy to be filled by the Government of one of the Three Powers or the Federal

¹ As amended by Schedule I of Protocol on Termination of Occupation Regime, Sen. Execs. L and M, 83d Cong., 2d Sess. (1954) at p. 20.

Government is not so filled within one month of its occurring, either the Governments of the Three Powers or the Federal Government may request the President of the International Court of Justice to make an interim appointment to the vacancy of a person who shall not be a national of any one of the Three Powers or a German national and who shall serve for a period of six months or until the vacancy is filled in the normal manner, whichever is longer. If the member to be replaced is a neutral member, the Governments of the Three Powers or the Federal Government may request the President of the International Court of Justice to make such appointment, if the agreement envisaged by subparagraph (c) of paragraph 2 of this Article has not been reached within one month of the vacancy occurring.

5. The Tribunal may, by majority vote, declare a vacancy if, in its opinion, a member has, without reasonable excuse, failed or refused to participate in the hearing or decision of a case to which he has been assigned.

ARTICLE 2

1. The members of the Tribunal shall be appointed for four years. They may be reappointed after the expiration of their terms of office.

2. A member whose term of office has expired shall nevertheless continue to discharge his duties until his successor is appointed. After such appointment he shall, unless the President of the Tribunal directs otherwise, continue to discharge his duties respecting pending cases in which he has participated until such cases have been finally decided.

3. Members of the Tribunal shall not engage in any activity incompatible with the proper exercise of their duties, nor shall they participate in the adjudication of any case with which they have previously been concerned in another capacity or in which they have a direct interest. Differences of opinion regarding the applicability of this paragraph shall be resolved by the Tribunal.

4. (a) During and after their terms of office, the members of the Tribunal shall enjoy immunity from suit in respect of acts performed in the exercise of their official duties.

(b) The members of the Tribunal who are not of German nationality shall, moreover, enjoy in the Federal territory the same privileges and immunities as are accorded chiefs of diplomatic missions. If sittings or official acts take place in the territory of one of the Three Powers, the members of the Tribunal who are not of the nationality of the country in which the sitting or act takes place shall enjoy diplomatic privileges and immunities in such country.

5. Every member of the Tribunal shall, before taking office, make a declaration at a public session that he will exercise his duties impartially and conscientiously.

6. Subject to the provisions of paragraph 5 of Article 1 of the present Charter, no member may be dismissed before the expiry of his term of

office, or before the termination of his duties in accordance with paragraph 2 of this Article, except by agreement between the Governments of the Three Powers and the Federal Government; or, in the case of a member appointed by the President of the International Court of Justice, by agreement between the Governments of the Three Powers and the Federal Government, with the consent of the President of the International Court of Justice.

ARTICLE 3

[Deleted.]

ARTICLE 4

1. The Tribunal, presided over by the President or one of the Vice-Presidents, shall sit either in plenary session or in Chambers of three members.

2. A plenary session shall, in principle, include all the members of the Tribunal. A quorum of five members shall suffice to constitute a plenary session; it shall be composed of an uneven number of members and in any case shall consist of an equal number of the members appointed by the Governments of the Three Powers and of those appointed by the Federal Government, and at least one neutral member.

3. Chambers shall be composed of one of the members appointed by the Governments of the Three Powers, one of the members appointed by the Federal Government and one neutral member.

4. The Tribunal in plenary session shall nominate the members of such Chambers, define the categories of cases with which a Chamber will be concerned or assign a particular case to a Chamber.

5. Any decision of a Chamber, on a case assigned to it, shall be deemed to be a decision of the Tribunal.

6. The final decision on a case assigned to a Chamber must be taken by the Tribunal in plenary session, if one of the parties so requests before the Chamber itself has pronounced a final decision.

ARTICLE 5

The Tribunal shall sit in public unless it decides otherwise. The deliberations of the Tribunal shall be and shall remain secret as shall all facts brought to its attention in closed session.

ARTICLE 6

1. A Registrar shall be responsible for the administration of the Tribunal; he shall have the necessary staff at his disposal. The Registrar shall handle the transmission of documents, keep a record of petitions submitted to the Tribunal and be responsible for the archives and accounts of the Tribunal.

2. The first Registrar shall be appointed by agreement between the Three Powers and the Federal Republic. The Registrar shall be a

permanent official subject to dismissal and replacement only by the Tribunal.

3. The Registrar, upon receipt of the first petition filed pursuant to Article 14 of the present Charter, shall immediately notify the President, who shall thereupon call the first meeting of the Tribunal in plenary session at the seat of the Tribunal as soon as practicable, for the purpose of determining the Rules of Procedure and attending to other business. Thereafter the Tribunal shall meet as business requires.

4. Paragraphs 3 and 4 of Article 2 of the present Charter shall not become effective until the first meeting in plenary session referred to in paragraph 3 of this Article.

ARTICLE 7

The seat of the Tribunal shall be located within the Federal territory at such place as shall be determined by a subsidiary administrative agreement between the Governments of the Three Powers and the Federal Government. The Tribunal may, however, sit and exercise its functions elsewhere, when it deems it desirable to do so.

ARTICLE 8

Questions pertaining to the operating costs of the Tribunal, including the official emoluments of members, as well as arrangements for securing the inviolability of the premises of the Tribunal, shall be regulated by the subsidiary administrative agreement referred to in Article 7 of the present Charter.

PART II—COMPETENCE AND POWERS OF THE TRIBUNAL

ARTICLE 9

1. The Tribunal shall have jurisdiction over all disputes arising between the Three Powers and the Federal Republic under the provisions of the Convention on Relations between the Three Powers and the Federal Republic of Germany (hereinafter referred to as "the Convention") or the present Charter or any of the related Conventions, listed in Article 8 of the Convention, which the parties are not able to settle by negotiation or by other means agreed between all the Signatory States, except disputes expressly excluded from its jurisdiction by the provisions of the Convention or the present Charter or any of the related Conventions.

2. (a) The Tribunal shall, moreover, have jurisdiction in respect of any question as to the extent of the competence of the following authorities:

The Board of Review referred to in Chapter One of the Convention on the Settlement of Matters Arising out of the War and the Occupation;

The Supreme Restitution Court referred to in Chapter Three of that Convention;

The Arbitral Commission on Property, Rights and Interests in Germany referred to in Chapters Five and Ten of that Convention.

(b) A question as to the extent of the competence of these authorities may be raised at any time after the institution of proceedings before them and also after a final decision.

(c) The decisions of the Tribunal on these questions shall be binding on the authorities whose competence has been questioned.

3. The decisions of the authorities specified in sub-paragraph (a) of paragraph 2 of this Article shall be subject to the jurisdiction of the Tribunal only to the extent contemplated in sub-paragraph (a) of paragraph 2 of this Article, unless the contrary is expressly provided in one of the related Conventions.

4. Decisions of the authorities provided for or referred to in the related Conventions, other than those specified in sub-paragraph (a) of paragraph 2 of this Article, shall be subject to review by the Tribunal, whether on questions as to the extent of competence or on the merits, only to the extent contemplated by paragraph 1 of this Article, unless the contrary is expressly provided in one of the related Conventions.

5. Only the Governments of one or more of the Three Powers, on the one hand, and the Federal Government, on the other, may be parties before the Tribunal. If the Federal Government brings a complaint against one or two of the Governments of the Three Powers, or if one or two of the Governments of the Three Powers brings a complaint against the Federal Government, the other Government or Governments of the Three Powers may apply to the Tribunal to be joined as parties.

ARTICLE 10

The Tribunal shall render its decisions in the form of judgments or directives which shall be binding on the parties.

ARTICLE 11

1. The Signatory States undertake to comply with the decisions of the Tribunal and to take the action required of them by such decisions or necessary to remedy the situation.

2. If a Signatory State required by a decision of the Tribunal to take action to give effect to that decision is unable, or fails, to take such action within the time specified by the Tribunal, or if no time is specified, within a reasonable time, then that State, or any other Signatory State a party to the dispute, may apply to the Tribunal for a further decision as to alternative action to be taken by the defaulting State.

ARTICLE 12

1. The Tribunal or, in a case of urgency, the President shall have the power, by the issue of directives, to take such measures as may be neces-

sary to conserve the respective rights of the parties pending the judgment of the Tribunal. Any directive issued by the President under this Article may be confirmed, amended or annulled by the Tribunal within seventy-two hours after the notification thereof to the parties.

2. The parties shall be afforded an opportunity to be heard prior to the issue of any directive by the Tribunal or by the President under this Article.

3. In the absence of the President, his powers under this Article shall be exercised by one of the Vice-Presidents to be designated by the President for this purpose.

PART III—PROCEEDINGS

ARTICLE 13

The official languages of the Tribunal shall be French, English, and German.

ARTICLE 14

Proceedings before the Tribunal shall be instituted by a written petition filed with the Tribunal which shall contain a statement of the facts giving rise to the dispute, reference to the provisions of the Convention or the present Charter or the related Conventions which are invoked, legal argument, and conclusions.

ARTICLE 15

1. The parties shall be represented by agents. They may be assisted by counsel.
2. Such agents and counsel shall enjoy immunity from suit in respect of acts performed in the exercise of their duties.

ARTICLE 16

1. The presiding member may summon the agents in order to be informed of their wishes concerning the time limits and conduct of the proceedings.
2. The presiding member shall set the time limits for the submission of pleadings and shall prescribe all the measures necessary for the conduct of the proceedings.
3. Certified copies of all documents submitted by either party shall be immediately forwarded to the other party through the Registrar.

ARTICLE 17

The proceedings shall consist of two parts; written and oral. Oral proceedings may be dispensed with if both parties so request.

ARTICLE 18

1. Written proceedings shall consist of a statement of the complainant's case, the defendant's answer and, unless the Tribunal directs otherwise, a reply and a rejoinder.

2. Counterclaims shall be permissible.

ARTICLE 19

1. Oral proceedings shall consist of the complainant's argument, the defendant's argument and, unless the Tribunal directs otherwise, a reply and a rejoinder, as well as hearings of witnesses and experts.

2. The Tribunal shall have power to demand the production of evidence, documentary or other, to require the attendance of witnesses to testify, to request expert opinion, and to direct inquiries to be made.

3. In the event that a party does not produce evidence which in the opinion of the Tribunal is relevant to the issues before it and which such party possesses or is in a position to procure, the Tribunal shall proceed to give its decision notwithstanding the absence of such evidence.

4. The presiding member or any other member of the Tribunal may put questions to the parties, witnesses and experts.

5. A written record of the oral proceedings shall be kept and shall be signed by the presiding member and the Registrar.

ARTICLE 20

All decisions of the Tribunal shall be based on the Convention, the present Charter and the related Conventions. The Tribunal shall, in the interpretation of such Conventions, apply the generally accepted rules of international law governing the interpretation of treaties.

ARTICLE 21

1. The Tribunal shall decide by majority vote.

2. Judgments shall state the reasons on which they are based.

3. Judgments shall be signed by the presiding member and by the Registrar.

4. Judgments shall be final and not subject to appeal.

5. In the case of a difference of opinion as to the meaning or scope of a judgment, the Tribunal may construe it by an interpretative judgment, on the application of either party and after having heard both parties.

ARTICLE 22

The revision of a judgment may not be requested of the Tribunal except upon the grounds of the discovery of a fact which is of such a nature as to exercise a decisive influence, and of which the Tribunal and the party requesting revision had been unaware before the pronouncement of the judgment, always provided that such ignorance was not due to negligence on the part of the party requesting the revision.

ARTICLE 23

1. Unless the Tribunal directs otherwise, each party to proceedings before the Tribunal shall pay its own costs.

2. The Tribunal shall bear the costs in respect of witnesses whose attendance it has required and expert opinions and inquiries which it has ordered.

ARTICLE 24

The Tribunal shall determine its own rules of procedure consistent with the present Charter.

PART IV—ADVISORY OPINIONS

ARTICLE 25

1. The Tribunal may, at the joint request of the Governments of the Three Powers and of the Federal Government, give an advisory opinion on any matter arising out of the Convention or the present Charter or the related Conventions, with the exception of those questions with which it would not have been competent to deal if they had been referred to it in the form of a dispute.

2. The Tribunal may, at the request of an authority referred to in paragraph 2 of Article 9 of the present Charter or at the request of the presiding member of such an authority, give an advisory opinion on the competence of such authority.

3. Advisory opinions shall not be binding.

CONVENTION ON THE SETTLEMENT OF MATTERS ARISING
OUT OF THE WAR AND THE OCCUPATION

*Signed at Bonn, May 26, 1952, as amended by Protocol on the Termination
of the Occupation Regime in the Federal Republic of Germany,
signed at Paris, October 23, 1954; in force May 5, 1955*¹

THE UNITED STATES OF AMERICA,
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
THE FRENCH REPUBLIC
and
THE FEDERAL REPUBLIC OF GERMANY,

Agree as follows:

CHAPTER ONE—GENERAL PROVISIONS

ARTICLE 1

1. The Federal and Land authorities shall have the power, in accordance with their respective competences under the Basic Law of the Federal

¹ Sen. Doc. No. 11, 84th Cong., 1st Sess. (1955), p. 77; reprinted from Sen. Exces. Q and R, 82d Cong., 2d Sess. (1952), p. 25, and Sen. Exces. L and M, 83d Cong., 2d Sess. (1954), p. 30.

Republic, to repeal or amend legislation enacted by the Occupation Authorities, except as otherwise provided in the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions listed in Article 8 thereof. Until such repeal or amendment, legislation enacted by the Occupation Authorities shall remain in force. Legislation enacted by the Control Council shall not be subject to repeal or amendment. Legislation by which the provisional boundaries of the Federal Republic have been established, or which is required to be maintained in force by other provisions of the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions, may only be amended or repealed with the consent of the Three Powers.

2. The Three Powers hereby delegate to the Federal Republic the right to deprive of effect within its territory, after consultation in each case with the Three Powers, all such legislation of the Control Council as is not required to be maintained in force by other provisions of the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions or as shall not have been required to be maintained in force by the Three Powers in the exercise of their rights relating to Berlin and to Germany as a whole, including unification of Germany and a peace settlement, referred to in the Convention on Relations between the Three Powers and the Federal Republic of Germany, as listed in a communication on behalf of the Governments of the Three Powers to the Federal Chancellor bearing the date of the signature of the present Convention.

3. The term "legislation" as used in the present Convention includes proclamations, laws, ordinances, decisions (other than Court decisions), directives, regulations, orders, licenses or any other similar enactments which have been officially published. Reference to any specific legislation shall include each and every part thereof, including the preamble, unless otherwise expressly provided.

4. The official text or texts of legislation referred to in this Article shall be the text or texts which was or were official at the time of enactment.

5. The term "Occupation Authorities" as used in this Chapter means the Control Council, the Allied High Commission, the High Commissioners of the Three Powers, the Military Governors of the Three Powers, the Armed Forces of the Three Powers in Germany, and organizations and persons exercising power on their behalf or, in the case of international organizations and organizations representing other Powers (and the members of such organizations), acting with their authorization, and auxiliary contingents of other Powers serving with the Armed Forces of the Three Powers.

ARTICLE 2

1. All rights and obligations created or established by or under legislative, administrative or judicial action of the Occupation Authorities are and shall remain valid for all purposes under German law whether or not their creation or establishment was in conformity with other legislation.

Such rights and obligations shall be subject without discrimination to the same future legislative, judicial and administrative measures as similar rights and obligations created or established by or under German municipal law.

2. All rights and obligations arising under the treaties and the international agreements listed in the enclosure with the communication of the Allied High Commissioners on behalf of the Governments of the Three Powers to the Federal Chancellor bearing the date of the signature of the present Convention and concluded on behalf of one or more of the three Western Zones of Occupation by the Occupation Authorities or by any one or more of the Governments of the Three Powers before the entry into force of the present Convention are and shall remain valid as though they had arisen under effective treaties and international agreements concluded by the Federal Republic.

ARTICLE 3

1. No person shall be prosecuted or prejudiced in his civil rights or economic position by the action of German courts or authorities solely on the ground that he has, prior to the entry into force of the present Convention, sympathized with or aided the cause of the Three Powers, or their policies or interests, or furnished information or services to the forces, authorities, or agencies of any one or more of the Three Powers, or to any person acting under the authority of any of them. The same shall apply in favour of persons who, prior to the entry into force of the present Convention, have shown sympathy to, or aided or furnished with information or services, the Allies of the Three Powers in their common cause. The German authorities shall apply all means at their disposal to ensure that the objectives of this paragraph are attained.

2. Except as provided in paragraph 3 of this Article, or by special agreement between the Governments of the Three Powers or the Power concerned and the Federal Government, German courts and authorities shall have no jurisdiction in any criminal or non-criminal proceedings relating to an act or omission which occurred before the date of entry into force of the present Convention, if immediately prior to such date German courts and authorities were without jurisdiction with respect to such act or omission whether *ratione materiae* or *ratione personae*.

3. Subject to the provisions of paragraph 1 of this Article and to any other relevant provision of the Convention on Relations between the Three Powers and the Federal Republic of Germany, or of the related Conventions, German courts may exercise such jurisdiction as they have under German law in respect of:

(a) non-criminal proceedings based on private law:

(i) against juristic persons, if the jurisdiction of German courts was previously excluded solely on the ground that such juristic persons were subject to the control of the Occupation Authorities under SHAEF and Military Government Laws No.

52 on Blocking and Control of Property, Control Council Law No. 9 Providing for the Seizure of Property Owned by I. G. Farbenindustrie and the Control Thereof, or Allied High Commission Law No. 35 on Dispersion of Assets of I. G. Farbenindustrie A. G.;

(ii) against natural persons, unless such proceedings arise out of, or concern acts or omissions in the course of the performance of, duties or services for the Occupation Authorities, or unless they arise from claims referred to in Article 3 of Chapter Nine of the present Convention. Maintenance cases shall become subject to the jurisdiction of German courts, however, only to the extent to which maintenance is claimed in respect of a period commencing after the entry into force of the present Convention;

(b) criminal proceedings against natural persons, unless investigation of the alleged offence was finally completed by the prosecuting authorities of the Power or Powers concerned, or unless such offence has been committed in the performance of duties or services for the Occupation Authorities.

Whenever in any criminal or non-criminal proceedings referred to in this paragraph a question arises whether or not a person has acted in the performance of duties or services for the Occupation Authorities, or whether or not the prosecuting authorities of the Power or Powers concerned have finally completed the investigation of an alleged offence, the German court shall accept a certificate of the Ambassador, or in his absence the *Chargé d'affaires*, of the Power concerned as conclusive proof of such question, to the extent covered by such certificate.

ARTICLE 4

1. No tribunals shall be maintained by the Three Powers in the Federal territory except as specifically provided in the present Convention or except tribunals exercising jurisdiction as contemplated in the Convention on Relations between the Three Powers and the Federal Republic of Germany or any of the related Conventions.

2. For the transitional period referred to in paragraph 3 of this Article, the United States Court and Court of Appeals of the Allied High Commission for Germany, established by Law No. 20 of the United States High Commissioner, the Courts of the Allied High Commission for Germany, British Zone, established by Military Government Ordinance No. 68 (amended 2) and Ordinances No. 222 and 224 of the United Kingdom High Commissioner, and the French Tribunals of the Allied High Commission for Germany, regulated by Ordinance No. 242 of the French High Commissioner, may continue to exercise jurisdiction under legislation of the Allied High Commission and of the High Commissioners to the extent necessary:

(a) to conclude any business before them on the entry into force of the present Convention;

(b) to make a decision in any criminal or non-criminal proceedings, other than criminal proceedings against a German national (within the meaning of German law), based on an act or omission which occurred before the date of entry into force of the present Convention and which was not immediately prior to that date subject to the jurisdiction of the German courts, if such proceedings are instituted within ninety days after the entry into force of the present Convention ;

and shall continue to apply the applicable law in force immediately prior to the entry into force of the present Convention. The Federal Republic undertakes that at the request of any one of the Three Powers investigations will be made by the appropriate German authorities regarding alleged violations by German nationals (within the meaning of German law) of legislation of the Occupation Authorities, and that criminal proceedings will be instituted where the investigations show such proceedings to be warranted.

3. The jurisdiction referred to in paragraph 2 of this Article shall, however, terminate ten months after the date of entry into force of the present Convention in the case of appellate tribunals, and six months after that date in the case of other tribunals, except that such tribunals may complete proceedings pending on such termination dates where this appears advisable in view of the status of the proceedings and of the interests of the persons concerned. With a view to completing all matters falling within their jurisdiction, insofar as possible, within the prescribed periods, the courts referred to in paragraph 2 of this Article may transfer any proceedings pending before them to competent German courts whenever the status of the proceedings and the interests of the persons concerned shall permit. In particular, the tribunals shall consider the possibility of such transfer in all criminal proceedings pending on the entry into force of the present Convention in which a German national (within the meaning of German law) is a defendant. The German court to which such transfer is made shall apply the applicable substantive law referred to in paragraph 2 of this Article.

4. The legislation referred to in paragraph 2 of this Article shall be maintained in force for such period as is necessary to effect the purposes of that paragraph.

ARTICLE 5

1. All judgments and decisions in non-criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes under German law, shall be treated as such by German courts and authorities and shall, on the application of a party, be enforced by them in the same manner as judgments and decisions of German courts and authorities.

2. Finality (Rechtskraft) shall, if it does not appear from a certified copy of the judgment, be conclusively proved by a certificate of the appropriate authorities of the Power concerned.

3. In connection with the enforcement of judgments objections affecting a claim reduced to judgment may be asserted by proceedings before the competent German court under Section 767 of the German Code of Civil Procedure.

ARTICLE 6

1. There is hereby established a Mixed Board (referred to in this Article as "the Board"). The task of the Board will be, without calling in question the validity of the convictions, to make recommendations for the termination or reduction of sentences, or for parole, in respect of persons convicted by a tribunal of an Allied Power of crimes against humanity or against the laws and usages of war or of crimes committed during the war, commonly referred to as "war crimes" and confined by the Three Powers in prisons in the Federal Republic on the entry into force of the present Convention.

2. The Board shall consist of six members, of whom one shall be appointed by the Government of each of the Three Powers and three by the Federal Government. The members of the Board shall be independent persons not exercising other official functions except as a judge or university teacher and not subject to instructions of the appointing Governments in formulating their recommendations. No person may be appointed who has participated in any manner in any war crimes trial.

3. (a) The right to terminate or reduce sentences and to grant parole in respect of persons referred to in paragraph 1 of this Article shall be exercisable by the Power which imposed the sentence.

(b) The right shall not be exercised unless the Board has previously made a recommendation. A unanimous recommendation of the Board shall be binding upon the Power which imposed the sentence.

(c) Save on matters dealt with in paragraphs 5 and 8 of this Article, the Board shall act only at the request of one of the Four Governments relating to a particular case or on the receipt of a petition by or on behalf of a person referred to in paragraph 1.

4. The Three Powers retain the rights heretofore held and exercised by them relating to the custody and carrying out of sentences of the persons referred to in paragraph 1 of this Article and will continue to exercise such rights until the Federal Republic is in a position to accept the custody of such persons.

5. The Federal Republic undertakes that at the time when the Three Powers transfer custody of the persons referred to in paragraph 1 of this Article to it, it will continue to confine such persons for the remainder of their sentences, as then in effect or as thereafter modified by the procedure provided in this Article, under the same conditions that govern their detention on the date of such transfer of custody. Changes in those conditions after such date shall be made only in accordance with decisions of the Board. In these matters the Board's decisions shall be final.

6. After the Board has been constituted, its members shall have free access to the institutions in which the persons referred to in paragraph 1 of this Article are confined and to such persons themselves.

7. The Board shall act by the vote of a majority of its six members.

8. The Board shall have exclusive power to decide, without reference to Governments, questions of interruption of sentences on compassionate or other grounds in accordance with principles and rules of procedure adopted by it. Pending the adoption of such principles and rules, the Board shall continue to apply the existing practices of each of the Three Powers in this field to the persons in the custody of such Power.

9. Notwithstanding the provisions of paragraphs 3 and 8 of this Article, and until the Board shall have commenced to function, each of the Three Powers may continue existing procedures with respect to reduction of sentences, release and interruption of sentences on compassionate or other grounds, without receiving any recommendation from the Board.

10. The rights of the Three Powers referred to in sub-paragraph (a) of paragraph 3 and in paragraph 4 of this Article and, without prejudice to the provisions of sub-paragraph (b) of paragraph 3 and of paragraphs 6 and 8, action taken thereunder shall not be subject to the jurisdiction of the Arbitration Tribunal or of any other tribunal or court.

11. The provisions of Article 7 of this Chapter shall not apply to the matters dealt with in this Article.

ARTICLE 7

1. All judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes under German law and shall be treated as such by German courts and authorities.

2. The German authorities will confine in German institutions until the termination of their sentences persons, other than members of the Forces (as defined in the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany), who have been or shall be sentenced by, or who are held for trial before, any tribunal referred to in paragraph 1 of this Article.

3. The German authorities shall treat persons confined in German institutions pursuant to paragraph 2 of this Article in accordance with humane penological principles and in the same manner as is prescribed for persons sentenced by, or held for trial before, German courts. The authorities of the Three Powers shall have access to German institutions in which such persons are confined and to such persons themselves.

4. The costs of confinement in German institutions pursuant to this Article shall be borne by the German authorities.

5. There shall be established within thirty days after the entry into force of the present Convention a Mixed Clemency Advisory Board consisting, on a basis of parity, of not less than one member appointed by the Government of each of the Three Powers and not less than three members

appointed by the Federal Government. The Board shall sit in panels consisting of one member appointed by the Government of the Power concerned and one of the members appointed by the Federal Government, for the purpose of making recommendations to the Power concerned or the Federal Republic, as required in paragraphs 6 and 7 of this Article, in matters of termination or reduction of sentence, parole, pardon and other acts of clemency regarding persons confined in German institutions pursuant to the provisions of paragraph 2 of this Article.

6. The Federal Republic shall have the exclusive right to make final decisions in all matters of termination or reduction of sentences, parole, pardon and other acts of clemency regarding German nationals (within the meaning of German law) confined, pursuant to paragraph 2 of this Article, in German institutions under German control. The recommendation of the Mixed Clemency Advisory Board established pursuant to paragraph 5 of this Article shall be obtained prior to any such decision. In cases of persons sentenced for offences against Allied personnel or property or against the Allied administration in Germany the Federal Republic shall make decisions in favour of such persons only in accordance with the recommendation of the appropriate panel of the Board.

7. Each of the Three Powers shall have the exclusive right to make final decisions in all matters of termination or reduction of sentences, parole, pardon and other acts of clemency regarding all persons, other than those referred to in paragraph 6 of this Article, sentenced by its courts and confined, pursuant to paragraph 2 of this Article, in German institutions under German control. The recommendation of the Mixed Clemency Advisory Board established pursuant to paragraph 5 of this Article shall be obtained prior to any such decision.

ARTICLE 8

The following persons shall enjoy immunity from suit within the Federal territory during their terms of office and, after the expiry of their terms of office, shall continue to enjoy such immunity in respect of acts performed in the exercise of their official duties:

- (a) members of the tribunals referred to in paragraph 2 of Article 4 of this Chapter;
- (b) members of the tribunals, referred to in paragraph 1 of Article 6 of Chapter Three of the present Convention, to which the Supreme Restitution Court succeeds;
- (c) members, appointed by any of the Three Powers, of the Mixed Board established by paragraph 1 of Article 6 of this Chapter or of the Mixed Clemency Advisory Board established pursuant to paragraph 5 of Article 7 of this Chapter;
- (d) members, appointed by any of the Three Powers, of the Board of Review referred to in paragraph 1 of Article 12 of this Chapter.

During their terms of office they shall also enjoy in the Federal territory the same privileges and immunities as are accorded members of diplomatic missions.

ARTICLE 9

1. The Allied High Commission legislation concerning the reorganization of the German coal mining and iron and steel industries, to the extent that such legislation is in force on the date of the entry into force of the present Convention, shall be maintained in force in so far and so long as deconcentration measures ordered before that date are still to be carried out or claimants are still to be protected.

2. The Federal Government shall ensure that the measures decreed under the legislation referred to in paragraph 1 of this Article by regulations or orders of the Allied High Commission or of its subordinate bodies, as well as the measures required to be taken in implementation of the plans approved by such orders shall be carried through to completion.

3. The provisions of this Article shall be without prejudice to such expansion or affiliation of enterprises of the German coal mining and iron and steel industries as shall be permitted under the Treaty on the Establishment of the European Community for Coal and Steel.

ARTICLE 10

1. A mixed committee of experts composed of seven members shall be established according to the following procedure. Three of its members shall be appointed by the Federal Republic and one by each of the Three Powers immediately after the Federal Government has received the first application under paragraph 3 of this Article and has notified the Three Powers of that fact. The members so appointed shall elect a seventh member by majority vote within six months after this notification. If within that time the seventh member shall not have been elected or shall not have accepted election, the Board of Directors of the Bank for International Settlements shall be requested to appoint as a seventh member an expert who shall not be a national of any of the Signatory States.

2. The function of the Mixed Committee shall be to consider applications for extensions of the final time for the disposition of securities required by regulations or orders of the Allied High Commission or its subordinate bodies or by reason of the terms of a plan approved by any such order.

3. Applications must be filed with the Federal Government not later than one year before the expiration of the time fixed for the disposition of the securities. The applicant shall, until the decision of the Mixed Committee is rendered, be entitled to file any additional supporting papers.

4. The Mixed Committee shall extend the time fixed for the disposition of the securities, provided that the applicant establishes that all of such securities could not, with the exercise of reasonable efforts, be disposed of on reasonable terms and on a basis which is compatible with the German public interest and that such disposition will not be possible within the remaining time without a disruptive effect on the German capital market.

5. Any extension under paragraph 4 of this Article shall be granted for not more than one year but shall be subject to renewal upon a further application on the basis of the standards set forth in that paragraph.

The Mixed Committee may attach appropriate conditions to any such extension or renewal.

6. The decision of a majority of the members shall constitute the decision of the Mixed Committee. The Committee shall render its decision before the expiration of the time fixed for the disposition of the securities.

7. The emoluments of the members of the Mixed Committee shall be paid by each of the Signatory States in respect of the member or members appointed by it. One-half of the emoluments of the seventh member shall be paid by the Federal Republic, and one-sixth by each of the Three Powers. The Mixed Committee may charge the remaining costs, in whole or in part, to the applicants.

8. The Mixed Committee shall adopt its own rules for the conduct of its business.

ARTICLE 11

1. The Allied High Commission legislation concerning the termination of the deconcentration and liquidation of I. G. Farbenindustrie A. G. i. L. to the extent that such legislation is in force on the entry into force of the present Convention shall be maintained in force until the liquidation of the I. G. Farbenindustrie A. G. i. L. in accordance with such legislation has been completely carried out. Those provisions of the legislation referred to in the first sentence of this paragraph which concern rights or obligations (*Rechtsverhältnisse*) continuing to exist after the completion of the liquidation of I. G. Farbenindustrie A. G. i. L. shall be maintained in force until such rights and obligations have been completely settled.

2. The Federal Government shall ensure that the measures decreed under the legislation referred to in paragraph 1 of this Article by regulations or orders of the Allied High Commission or of its subordinate bodies shall be carried through to completion.

ARTICLE 12

1. After the entry into force of the present Convention the Board of Review provided for under Article 13 (as amended) of Allied High Commission Law No. 27 shall consist of one member appointed by each of the Three Powers and three members appointed by the Federal Republic. As so constituted this Board of Review shall continue to be the sole appropriate body to review, on the petition of interested persons, any orders issued under sub-paragraph (c) of Article 5 of Law No. 27, or under paragraph 1 of Article 5 of Allied High Commission Law No. 35. The independence of the members of the Board of Review and their freedom of decision shall not be impaired by instructions or other actions of their Governments. Before rendering a decision the Board of Review shall grant the claimant a hearing.

2. The emoluments of the members of the Board of Review shall be paid by each of the Signatory States in respect of the member or members appointed by it. One-half of the remaining expenses of the Board of

Review shall be borne by the Federal Republic, and one-sixth by each of the Three Powers.

ARTICLE 13

In order to facilitate the smooth transition from the Occupation regime to normal diplomatic relationships, and to provide for the accommodation of the Embassies and Consulates of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic, the Governments of the United States, the United Kingdom and the French Republic are hereby granted the right, subject to the payment of compensation in appropriate cases, to the continued use for a transitional period of the property used by them on the entry into force of the present Convention, provided such property is required for use by the Embassies and Consulates to be set up by them.

CHAPTER TWO—DECARTELIZATION AND DECONCENTRATION

[Deleted.]

CHAPTER THREE—INTERNAL RESTITUTION

ARTICLE 1

This Chapter relates to:

(a) the restitution of identifiable property to victims of Nazi oppression pursuant to the following legislation:

(i) for the British Zone of Occupation

Military Government Law No. 59, as amended or supplemented by Ordinances Nos. 205, 212, 225, 232, 233, 237, 240, 243, 252 and 255 of the United Kingdom High Commissioner, by Notice No. 1 under Ordinance No. 233 and by Regulations Nos. 1 to 13 inclusive in their last amended versions;

(ii) for the United States Zone of Occupation

Military Government Law No. 59, as amended or supplemented by Amendments Nos. 1 and 2, by Laws Nos. 3, 4, 5, 12, 13, 14, 21 (as amended), 30 and 42 of the United States High Commissioner and by the regulations issued pursuant thereto;

(iii) for the French Zone of Occupation

Ordinance No. 120 of the French Commander-in-Chief, as amended or supplemented by Ordinances Nos. 156, 186, and 213 of the French Commander-in-Chief and by Ordinances Nos. 268 and 274 of the French High Commissioner, Order No. 177 under Ordinance No. 120 (as amended) and Ordinance No. 252 of the French High Commissioner, as amended by Ordinance No. 255;

(b) the restitution or reallocation of property seized under the National Socialist regime from co-operative societies, trade unions, charitable organizations and other democratic organizations, pursuant to Control Council Directive No. 50 and to the following legislation:

(i) for the British Zone

Military Government Ordinances Nos. 150 and 159, as amended by Ordinances Nos. 208 and 227 of the United Kingdom High Commissioner, paragraph 3 of Article 4 of Military Government Ordinance No. 202 and Ordinance No. 254 of the United Kingdom High Commissioner;

(ii) for the United States Zone

Military Government Law No. 58, as amended or supplemented by Supplement No. 1 to Instructions Implementing Military Government Law No. 58 and Control Council Directive No. 50, by Regulation No. 1 pursuant to Military Government Law No. 58 and by Article 2 of Allied High Commission Law No. A-14;

(iii) for the French Zone

Ordinance No. 141 of the French Commander-in-Chief;

(c) the blocking, control, administration and final disposal, in accordance with the legislation referred to in sub-paragraphs (a) and (b) of this Article, of the property also referred to in those sub-paragraphs pursuant to SHAEF and Military Government Laws No. 52 (as amended) and the regulations, orders, licenses, and instructions issued thereunder, so far as applicable to such property or the proceeds thereof.

ARTICLE 2

The Federal Republic hereby acknowledges the need for, and assumes the obligation to implement fully and expeditiously and by every means in its power, the legislation referred to in Article 1 of this Chapter and the programmes for restitution and reallocation thereunder provided. The Federal Republic shall entrust a Federal agency with ensuring the fulfilment of the obligation undertaken in this Article, paying due regard to the provisions of the Basic Law. The following Articles of this Chapter shall not be construed as limiting to the measures therein specified the obligation assumed under this Article.

ARTICLE 3

1. Subject to the provisions of Article 6 of this Chapter, the legislation referred to in Article 1 of this Chapter, as amended in paragraph 2 of Article 4 of this Chapter, shall be maintained in force until all claims

filed thereunder have been fully dealt with. Moreover, that portion of such legislation as relates to the establishment, rights and continued existence of successor organizations and trust corporations shall be maintained in force until all such organizations and corporations have completed the tasks for which they were created.

2. The Federal Republic may exercise all legislative powers exercisable by the Three Powers or any of them pursuant to such legislation, in a manner not inconsistent therewith, by means of Federal legislation or of ordinances of the Federal Government.

3. [Deleted.]

4. The Federal Republic hereby undertakes to maintain and to augment or supplement in the several Zones of Occupation of the Three Powers, where necessary for the effective carrying out of the programmes referred to in Article 2 of this Chapter, the existing administrative and judicial agencies or organizations which are concerned with

(a) the blocking, control, administration, unblocking and disposal of property subject to claims under the legislation referred to in Article 1;

(b) the filing, investigation, assessment, adjudication and final settlement of claims under that legislation.

5. The Federal Republic further undertakes

(a) [Deleted.]

(b) [Deleted.]

(c) [Deleted.]

(d) at all times after the entry into force of the present Convention, to apply to non-residents who are successful claimants under the legislation referred to in Article 1 of this Chapter, terms and conditions for the following transactions:

(i) the use and disposal (including the removal from the Federal territory) of property restituted to them, or property acquired in replacement or with the proceeds thereof, and

(ii) the use and disposal of Deutsche Mark balances resulting from the satisfaction of restitution claims and from the proceeds of the realization of restituted properties including the conversion of such balances into foreign exchange and the transfer abroad of such exchange

which shall be no less favourable than those applicable to them immediately before the entry into force of the present Convention, or than those which may, at the time of the transaction, be applicable to owners of other property who give up their ordinary residence in the Federal territory, whichever are the more favourable.

6. The undertakings of the Federal Republic pursuant to this Article and to Article 2 of this Chapter shall not involve any direct obligation with regard to the establishment of the Restitution Agencies of the Länder, and the agencies of the Länder dealing with the matters referred to in

sub-paragraph (c) of Article 1 of this Chapter, and their administrative procedures. However, no changes shall be made with regard to existing establishments and administrative procedures which would in any way impede or endanger the full and expeditious implementation of the programmes referred to in Article 2.

ARTICLE 4

1. The Federal Republic hereby undertakes

(a) subject to paragraph 3 of this Article to ensure the payment to restitutees of all judgments or awards which have been or hereafter shall be given or made against the former German Reich under the legislation referred to in Article 1 of this Chapter;

(b) to assume forthwith, by appropriate arrangements with the City of Berlin, liability for the payment, on terms corresponding to those set out in this Article, of all judgments and awards against the former German Reich under the internal restitution legislation in force in the Western Sectors of Berlin.

2. The legislation referred to in sub-paragraphs (a) and (b) of Article 1 of this Chapter shall be deemed to be amended so as to provide that judgments or awards based on indebtedness in Reichsmarks of the former Reich for a sum of money (*Geldsummenansprüche*) shall be converted into Deutsche Marks at the rate of ten Reichsmarks for one Deutsche Mark. Judgments or awards for compensation which may be given against the former Reich under the legislation referred to in sub-paragraphs (a) and (b) of Article 1 shall be made in Deutsche Marks assessed in accordance with the general principles of German law applicable to the assessment of compensation as set forth in the German Civil Code.

3. The obligation of the Federal Republic to the Three Powers with respect to money judgments and awards under paragraph 1 of this Article shall be satisfied when such judgments and awards shall have been paid or shall, if the Federal Republic so requests, be considered to have been satisfied when the Federal Republic shall have paid a total of DM 1,500,000,000 thereon. In determining the time and method of payment of such judgments and awards, the Federal Republic may take into consideration its capacity to pay.

ARTICLE 5

Successor organizations and trust corporations appointed pursuant to the legislation referred to in sub-paragraph (a) of Article 1 of this Chapter, whether or not organized under German law, now enjoy immunity from taxation in the Federal Republic. With regard to taxes the proceeds of which accrue exclusively to the Federation, the organizations and corporations shall continue to enjoy this immunity. They shall also be exempt from any exceptional taxes, levies and imposts, the incidence of which is in fact upon capital assets, imposed in whole or in part for the specific

purpose of meeting charges arising out of the war, or out of reparation or restitution to any of the United Nations. With regard to taxes the proceeds of which accrue, in whole or in part, to the Länder, Gemeinden or Gemeindeverbände, the Federal Government will enter into a separate arrangement having in mind the charitable purposes of these organizations and corporations.

ARTICLE 6

1. There is hereby established a Supreme Restitution Court to succeed, under the legislation referred to in sub-paragraph (a) of Article 1 of this Chapter:

- (a) the Supreme Restitution Court for the British Zone;
- (b) the United States Court of Restitution Appeals of the Allied High Commission for Germany for the United States Zone;
- (c) the Higher Court of Restitution (Cour Supérieure pour les Restitutions) for the French Zone.

The composition, jurisdiction, powers and duties of the Supreme Restitution Court shall be as prescribed by the Charter of the Supreme Restitution Court annexed to this Chapter.

2. Each Tribunal to which the Supreme Restitution Court succeeds shall within three months decide those cases in process of final disposition on the entry into force of the present Convention and shall refer to the Supreme Restitution Court all cases not decided at the end of that period. For the purposes of the present Convention, cases which a tribunal, on the entry into force of the present Convention, has not begun to investigate and consider judicially, or has investigated and considered judicially only in regard to matters of procedure, shall not be considered as cases which, on the entry into force of the present Convention, were in process of final disposition.

ANNEX TO CHAPTER THREE

CHARTER OF THE SUPREME RESTITUTION COURT

ARTICLE 1

1. The Court shall consist of

- (a) the President of the Court,
- (b) the Presidential Council (Präsidium),
- (c) three Divisions (Senate).

2. Each Division shall be composed of at least five justices, a Clerk and registry, with sufficient personnel to carry out its functions effectively.

3. State Counsel may be appointed to any of the Divisions in such a manner as the Governments of the Three Powers and the Federal Government may decide. Paragraphs 3, 4 and 5 of Article 2 and paragraphs

1, 4, 5 and 6 of Article 3 of the present Charter shall apply *mutatis mutandis*.

4. A Division shall be dissolved when no further cases remain to be dealt with by it. The terms of office of all its justices shall thereupon terminate. The Court shall be dissolved on the same date as the last active Division is dissolved.

5. The seat of the Court shall be at Herford. The First Division of the Court shall have its seat at Rastatt, the Second Division at Herford and the Third Division at Nuremberg.

6. The Presidential Council may from time to time with the approval of the Governments of the Three Powers and the Federal Government determine

- (a) a new seat for the Court or any of its Divisions,
- (b) the number of justices required by any of the Divisions in addition to those appointed in accordance with Article 2,
- (c) the date of dissolution of each of the Divisions,
- (d) the establishment of administrative and other non-judicial staff required by the Court or any of its Divisions, so far as this is not provided for in the present Charter.

7. Without prejudice to the provisions of paragraph 6, the Presidential Council shall render annual reports to the Governments of the Three Powers and the Federal Government setting forth its requirements for judicial and other personnel for the twelve months next following the date of the report. The first report shall be rendered between the fourteenth and seventeenth month after the entry into force of the present Charter.

ARTICLE 2

1. The five justices referred to in paragraph 2 of Article 1 shall be appointed as follows:

- (a) two justices appointed by the Government of the French Republic in the case of the First Division; two by the Government of the United Kingdom in the case of the Second Division; and two by the Government of the United States in the case of the Third Division;
- (b) two justices appointed by the Federal Government;
- (c) one justice who shall be neither a national of any of the Three Powers nor a German national, and who shall be appointed by agreement between the Government of the Power designated in sub-paragraph (a) of this paragraph to appoint justices to the Division concerned (hereinafter referred to as "the Power concerned") and the Federal Government, or failing such agreement, by the President of the International Court of Justice.

2. The Governments of the Three Powers and the Federal Government shall make known their first appointments pursuant to paragraph 1 of this Article not later than the date of entry into force of the present

Charter. By the same date the Power concerned and the Federal Government shall agree upon the justice referred to in sub-paragraph (c) of paragraph 1. If he has not been appointed within one month after that date, either the Power concerned or the Federal Government may request the President of the International Court of Justice to appoint him. The provisions of the preceding sentence shall also apply if the Power concerned and the Federal Government fail to agree on the appointment of an additional justice who is not to be appointed unilaterally by the Power concerned or the Federal Government, within one month after approval of a decision of the Presidential Council under sub-paragraph (b) of paragraph 6 of Article 1 of the present Charter that such an additional justice is required.

3. The justices appointed by the Governments of the Three Powers shall be qualified in accordance with the legislation referred to in Article 1 of the foregoing Chapter. The justices appointed by the Federal Government shall be qualified for judicial office in a Land of the Federal Republic. The other justices shall have the qualifications required in the country of which they are nationals or residents for appointment to judicial office or equivalent qualifications.

4. The Presidential Council may declare a vacancy for a justice if, in its opinion, a justice has, without reasonable excuse, failed

- (a) to attend a meeting for which he has been duly designated, or
- (b) otherwise to perform his duties diligently.

5. The appointment to fill a vacancy created by the expiration of the term of office, death, resignation, or removal from office in accordance with the preceding paragraph of a justice shall be made in the same manner as his appointment within one month of the vacancy occurring.

ARTICLE 3

1. Subject to the provisions of paragraph 4 of Article 1 of the present Charter, all justices shall be appointed in the first instance for a period of two years and their terms of office may be renewed thereafter for successive periods of one year. At least six months' notice in writing shall be given to a justice of intention not to renew his term of office. A justice appointed by the Government of one of the Three Powers shall be notified of such intention by the Power concerned, a justice appointed by the Federal Government shall be notified of such intention by it, and a justice appointed by the Government of one of the Three Powers and the Federal Government jointly or by the President of the International Court of Justice shall be notified of such intention by the Power concerned and the Federal Government. In the absence of notice, a justice shall continue in office for a period of one year.

2. Any justice may at any time resign his office. But he shall continue in office until his successor has taken office.

3. No justice may be dismissed from office, except in accordance with paragraph 4 of Article 2 of the present Charter.

4. No justice shall be assigned to any non-judicial function, engage in any activity incompatible with the exercise of his duties, or participate in the adjudication of any claim with which he has been previously concerned in any capacity, except as a member of a tribunal to which the Court succeeds, or in which he has a direct interest. Differences of opinion regarding the applicability of this paragraph shall be resolved by the appropriate Division in accordance with Article 8 of the present Charter.

5. (a) Every justice shall, during his term of office, have the rank of an equivalent member of the Federal Supreme Court and shall, both during and after his term of office, enjoy immunity from suit in respect of acts performed by him in the exercise of his official duties.

(b) A justice who is not a German national shall, during his term of office, enjoy in the Federal territory the same privileges and immunities as are accorded members of diplomatic missions.

6. Each justice shall, before taking office, make a declaration at a public session that he will exercise his duties impartially and conscientiously.

ARTICLE 4

1. Each Division shall be presided over by the justice appointed pursuant to sub-paragraph (c) of paragraph 1 of Article 2 of the present Charter. When he is unable to act, he shall be replaced by a deputy designated by the Presidential Council from the justices not appointed unilaterally by the Power concerned or the Federal Government.

2. The presiding justice or his deputy shall preside at all sittings of his Division, shall fix the time of the sittings, shall determine how the business of the Division shall be divided between its justices and shall be generally responsible for its administration.

ARTICLE 5

1. The presiding justice of the First Division shall act as President of the Court for the remainder of the calendar month in which the present Charter enters into force and for the four full calendar months next following. Thereafter, the presiding justice of each Division in his turn shall so act for four calendar months at a time.

2. The Presidential Council shall consist of the following nine persons:

(a) the President of the Court and the other two presiding justices of Divisions, or their respective deputies;

(b) a justice from each Division or his deputy designated by the Power concerned;

(c) a justice from each Division or his deputy designated by the Federal Government.

3. The Council shall decide by a majority vote of the nine members, except in cases arising under paragraph 4 of Article 2 of the present Charter, when a two-thirds majority shall be necessary.

4. The Council shall meet at the seat of the Court at such times as the President shall decide.

5. The Council shall be competent

(a) to consider, at the request of any of its members, questions which are of common interest to more than one Division and to inform the presiding justices of the Divisions accordingly;

(b) to decide concerning the interpretation or application of the present Charter, or concerning any other matters assigned to its competence by the present Charter;

(c) to exercise the following powers conferred by the legislation referred to in Article 1 of the foregoing Chapter;

(i) [Deleted.]

(ii) the powers of the United Kingdom High Commissioner, under paragraph 8 of Article 2 and paragraph 4 of Article 3 of Regulation No. 8, as amended by Regulation No. 11, under British Military Government Law No. 59, to approve rules of procedure; and, under his Ordinance No. 233, to approve agencies by notice.

6. The Presidential Council shall appoint the Court Clerks nominated under paragraph 1 of Article 6 of the present Charter, but they shall be directly and exclusively responsible to the presiding justices of the Divisions to which they are appointed. The Presidential Council may also appoint its own administrative staff, which shall be subject to the control of the President of the Court and may be nominated by the Federal Government if the Presidential Council so desires.

7. The Council may determine its own rules of procedure.

ARTICLE 6

1. The Court Clerks shall be nominated as follows:

(a) The Clerk of the First Division, by the Government of the French Republic;

(b) the Clerk of the Second Division, by the Government of the United Kingdom;

(c) the Clerk of the Third Division, by the Government of the United States.

2. Each Court Clerk shall have the same powers and duties as the Clerk or Secretary of the tribunal to which his Division succeeds and such additional duties as shall be assigned to him by the presiding justice of that Division.

3. Paragraphs 3, 4 and 5 of Article 2 and paragraphs 4 and 5 of Article 3 of the present Charter shall apply *mutatis mutandis* to the Court Clerks.

ARTICLE 7

1. The Federal Republic shall maintain at its own cost and expense the existing facilities and accommodations in use by the tribunals to which the Court succeeds and shall provide such additional facilities and accommodations as the Court may, according to a decision of the Presidential Council, from time to time require.

2. (a) The salaries and allowances of the judicial, administrative and other staff of the Court which is nominated, appointed, or employed by the Government of any of the Three Powers shall be fixed and paid by that Power in consultation with the Federal Government. Such salaries and allowances shall be reimbursed to that Power by the Federal Republic.

(b) The salaries and allowances of the judicial, administrative and other staff which are nominated, appointed, or employed by the Federal Government shall be fixed by the Federal Government, in consultation with the Power concerned, and paid by the Federal Republic.

(c) The salaries and allowances of justices who are not appointed unilaterally by the Power concerned or the Federal Government shall be fixed by agreement between the Governments of the Three Powers and the Federal Government and paid by the Federal Republic.

3. All persons referred to in sub-paragraphs (a) and (b) of paragraph 2 of this Article shall be subject to the administrative and disciplinary control of the appointing, nominating or employing Government, so far as such a control is not inconsistent with the present Charter.

ARTICLE 8

1. All matters shall be adjudicated by five justices of the appropriate Division, of whom one shall be the President or his deputy, two shall be justices appointed by the Power concerned, and two shall be justices appointed by the Federal Government.

2. Decisions of the Divisions shall be given by majority vote and shall be final subject only to the provisions of paragraph 3 of Article 9 of the present Charter.

3. The public shall be admitted to all formal hearings (*mündliche Verhandlungen*).

4. The deliberations of the Presidential Council and of the Divisions shall be secret.

ARTICLE 9

1. The Court shall exercise powers and jurisdiction through its Divisions as follows:

(a) the First Division shall exercise the powers and jurisdiction of the Higher Restitution Court established by Ordinance No. 252 of the French High Commissioner;

(b) the Second Division shall exercise the powers and jurisdiction of the Supreme Restitution Court for the British Zone established by Ordinance No. 255 of the United Kingdom High Commissioner;

(c) the Third Division shall exercise the powers and jurisdiction of the Court of Restitution Appeals established by Law No. 21 (as amended) of the United States High Commissioner.

2. The legislation referred to in Article 1 of the foregoing Chapter shall accordingly be construed and applied by substituting the First Division for the Higher Restitution Court in legislation applicable in the French Zone, the Second Division for the Supreme Restitution Court for the British Zone in legislation applicable in the British Zone, and the Third Division for the Court of Restitution Appeals in legislation applicable in the United States Zone.

3. Decisions of the Arbitration Tribunal pursuant to paragraph 2 of Article 9 of the Charter of the Arbitration Tribunal referred to in Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany and the provisions of Article 10 of that Charter shall be binding on the Court and on all German courts and authorities, so far as those decisions and provisions concern the extent of the jurisdiction of the Court.

ARTICLE 10

1. The official languages of the Presidential Council shall be French, English and German.

2. Otherwise, the official languages of the Court shall be,

(a) for the First Division, French and German;

(b) for the Second and Third Divisions, English and German..

CHAPTER FOUR—COMPENSATION FOR VICTIMS OF NAZI PERSECUTION

1. The Federal Republic acknowledges the obligation to assure in accordance with the provisions of paragraphs 2 and 3 of this Chapter adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.

2. In the discharge of this obligation, the Federal Republic undertakes

(a) that legislation in this field in the Federal territory shall in the future be not less favourable to claimants than the legislation in force;

(b) that, furthermore, there shall be enacted expeditiously legislation supplementing and amending the legislation now in force in the

various Länder which shall, subject to the provisions of sub-paragraph (a) of this paragraph, afford a basis throughout the Federal territory for compensation no less favourable than is afforded in the legislation now in force in the Länder of the United States Zone;

(c) that the legislation referred to in sub-paragraph (b) of this paragraph shall adequately take into account the special conditions arising from the persecution itself, including the loss and destruction of records and documents resulting from the conditions of the persecution or the acts of the persecuting agencies and the death or disappearance of witnesses and of persecuted persons as a result of the persecution;

(d) that the effective and expeditious processing, determination and satisfaction of claims for compensation in this field shall be assured without discrimination against any groups or classes of persecuted persons;

(e) that in all cases where a claim for compensation submitted to the competent authorities has been disallowed under the legislation then in force, but where such a claim would be admissible under supplementary or replacement legislation enacted in accordance with sub-paragraph (b) of this paragraph, the persecuted person shall be assured the possibility of submitting again his claim in spite of the previous rejection thereof;

(f) that the provision of funds adequate to meet all claims under the legislation referred to in sub-paragraphs (a) and (b) of this paragraph shall be ensured by the Federal Republic in accordance with paragraph 3 of this Chapter.

3. The capacity to pay of the Federal Republic may be taken into consideration in determining the time and method of compensation payments under paragraph 1 of this Chapter and in providing adequate funds under sub-paragraph (f) of paragraph 2.

CHAPTER FIVE—EXTERNAL RESTITUTION

ARTICLE 1

1. Upon the entry into force of the present Convention, the Federal Republic shall establish, staff and equip an administrative agency which shall, as provided in this Chapter and the Annex thereto, search for, recover and restitute jewellery, silverware and antique furniture (where individual articles are of substantial value), and cultural property, if such articles or cultural property were, during the occupation of any territory, removed therefrom by the forces or authorities of Germany or its Allies or their individual members (whether or not pursuant to orders) after acquisition by duress (with or without violence), by larceny, by requisitioning or by other forms of dispossession by force.

2. In the case of cultural property which was present in the country concerned prior to the date applicable to that country as specified in Article 5 of this Chapter, restitution shall also be made

(a) if it was acquired by way of gift made under direct or indirect pressure or in consideration of the official position of the recipient;

(b) if it was acquired by way of purchase, unless it had been brought into the country concerned for the purpose of sale.

3. In the case of jewellery, silverware or antique furniture, restitution may be denied if it is established that the property concerned was removed after acquisition from the original owner for value by way of a regular commercial transaction, even if payment was made in occupation currency.

4. The term "cultural property" shall comprise movable goods of religious, artistic, documentary, scholarly or historic value, or of equivalent importance, including objects customarily found in museums, public or private collections, libraries or historic archives. The term "antique" shall mean property which upon the entry into force of the present Convention is one hundred or more years old. The term "substantial value" shall mean a value of not less than 200,000 French francs at the 1 January 1951 purchasing power.

5. The agency referred to in paragraph 1 of this Article will give information on matters dealt with by it to the Three Powers or their representatives on request and submit quarterly reports on its activity. The records of the agency shall be preserved until otherwise agreed.

ARTICLE 2

1. Restitution pursuant to Article 1 of this Chapter may be requested from the Federal Government only by the Government of the State from the territory of which the property was removed. The Federal Government may reject a restitution request if such request has already been rejected as not well founded by the appropriate agency of one of the Three Powers, except in a case where evidence which could not previously be presented is adduced.

2. Restitution of jewellery, silverware or antique furniture may only be claimed from the Federal Government if a pertinent request has been lodged with an agency of any of the Three Powers prior to the entry into force of the present Convention. In the case of cultural property, no new claim for restitution may be filed after 8 May 1956. Where, in any particular case, the investigations of the German agency referred to in Article 1 of this Chapter with respect to claimed property have been unsuccessful or where they have not led to the discovery of the claimed property by 8 May 1957, and where further investigations are unlikely to be successful, the agency shall discontinue the proceedings. Such a decision may be appealed from by the party concerned to the Arbitral Commission on Property, Rights and Interests in Germany pur-

suant to Article 7. If, after such discontinuance, the claimed property is identified, the restitution proceedings may be reopened.

3. Claims filed with an agency of any of the Three Powers and not finally disposed of prior to the entry into force of the present Convention and falling within the scope of the provisions of Article 1 of this Chapter and this Article shall be referred by the Power concerned to the German agency referred to in Article 1. They shall be acted upon by the German agency as though filed directly with it by the claimant Government.

4. Submission of a claim for restitution pursuant to Article 1 of this Chapter on behalf of any person or entity shall preclude such submission pursuant to Article 3; likewise, action for restitution pursuant to Article 3 shall preclude submission of a claim for restitution pursuant to Article 1.

ARTICLE 3

1. Notwithstanding provisions of German law to the contrary, any person who, or whose predecessor in title, during the occupation of a territory, has been dispossessed of his property by larceny or by duress (with or without violence) by the forces or authorities of Germany or its Allies, or their individual members (whether or not pursuant to orders), shall have a claim against the present possessor of such property for its restitution, subject, however, to:

(a) reimbursement by the claimant to the defendant for expenditures, which have enhanced the value of the property, made after its acquisition;

(b) payment by the claimant of the value of any consideration received by him or his predecessor in title, which shall be treated in the same manner as German assets existing at the date of removal in the country from which the property was removed.

No such claim shall exist if the present possessor has possessed the property bona fide for ten years or until 8 May 1956, whichever is later.

2. Any claim to restitution pursuant to paragraph 1 of this Article may be brought before a German court on or before 8 May 1956 or before the expiration of ten years during which the possessor possessed the property bona fide, whichever is later, by any national or resident of a State which has acceded to the Charter of the Arbitral Commission on Property, Rights and Interests in Germany.

3. No restitution claim may be asserted, if, prior to the entry into force of the present Convention, a request by a Government on behalf of the claimant for restitution of the property concerned was rejected as not well founded by an agency of one of the Three Powers, except in a case where evidence which could not previously be presented is adduced.

ARTICLE 4

1. If property to be restituted has, after identification in Germany, either been utilized or consumed in Germany before return to the claimant or been destroyed, stolen or otherwise disposed of before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, the Federal Republic shall compensate claimants who would otherwise be entitled to restitution under Article 1 or 3 of this Chapter, or who, at the entry into force of the present Convention, have had their claims for restitution approved by one of the Three Powers.

2. The German agency referred to in Article 1 of this Chapter shall, upon application by the claimant otherwise entitled to restitution, render a decision on the compensation claim in respect of property the restitution of which could have been requested under Articles 1 and 2. The court stipulated in Article 3 shall, upon suit brought by the claimant otherwise entitled to restitution, render a decision on the compensation claim in respect of property the restitution of which could have been requested under Article 3, provided that the plaintiff is a national or a resident of a State which has acceded to the Charter of the Arbitral Commission on Property, Rights and Interests in Germany. The filing of the application and the bringing of the suit must take place not later than one year after the entry into force of the present Convention or one year after notification to the claimant that the property is not available for restitution, whichever is later.

3. Notwithstanding the provisions of paragraph 2 of this Article, claims falling within the scope of paragraph 1 filed with an agency of any of the Three Powers before the entry into force of the present Convention may either be referred by that Power to the German agency referred to in Article 1 of this Chapter or be filed with that agency by the claimant Government. All claims under this paragraph shall be referred to or filed with the agency not later than six months after the entry into force of the present Convention and shall be decided by it.

4. The German agency referred to in Article 1 of this Chapter shall recognize claims for restitution which have been approved by any of the Three Powers prior to the entry into force of the present Convention. The agency shall also accept as conclusive a certificate by any one of the Three Powers that the property which was the subject of the claim had not been received by an appropriate agency of that Power for despatch to the claimant.

5. Compensation pursuant to this Article shall be awarded in the amount of the replacement value of the property concerned as of the date of the award.

ARTICLE 5

1. The provisions of this Chapter shall apply in respect of the following countries as of the respective date set forth below:

Country	Date
Austria	12 March 1938
Czechoslovakia	1 April 1939
Poland	1 September 1939
Denmark	9 April 1940
Norway	9 April 1940
Belgium	10 May 1940
Luxembourg	10 May 1940
Netherlands	10 May 1940
France	17 May 1940
Greece	28 October 1940
Yugoslavia	6 April 1941
Union of Soviet Socialist Republics	22 June 1941
Italy	3 September 1943
Rumania	12 September 1944
Finland	19 September 1944
Bulgaria	28 October 1944
Hungary	20 January 1945

2. The provisions of this Chapter shall cover public and private property which was removed from territories referred to in paragraph 1 of this Article.

ARTICLE 6

If the Federal Republic concludes with any other Power, on matters within the scope of this Chapter, arrangements more favourable to such other Power than the corresponding provisions of this Chapter, the benefits of such new arrangements shall automatically be extended to all powers benefiting from those provisions.

ARTICLE 7

1. The Signatory States hereby establish an Arbitral Commission on Property, Rights and Interests in Germany, which shall function in accordance with the provisions of its Charter annexed to the present Convention.

2. Upon application of the party concerned, any final decision (Endentscheidung) by the German agency pursuant to Articles 1, 2 or 4 of this Chapter, or by a German court pursuant to Articles 3 or 4, shall be subject to review by the Arbitral Commission on Property, Rights and Interests in Germany.

3. Application to the Commission shall be submitted by the party concerned within thirty days after service of such decision. If the German agency or the German court does not render a decision within one year after submission of the claim, the claimant may submit his claim directly to the Commission within thirty days following the expiration of the one year period.

4. In any case submitted to it, the Commission may itself render a final decision in regard to such case or may remand it to the German agency or to the German court with such instructions as the Commission deems necessary or appropriate.

5. The judgments of the Commission shall be final and binding on the authorities and courts of the Signatory States and other States acceding to its Charter.

ANNEX TO CHAPTER FIVE

Section 1

1. The Federal Government shall establish the administrative agency provided for in paragraph 1 of Article 1 of the foregoing Chapter as a Federal Higher Authority (Bundesoberbehörde).

2. All German courts and authorities shall render the Federal Higher Authority legal and other official assistance pursuant to Article 35 of the Basic Law.

Section 2

1. Applications for restitution pursuant to Articles 1 and 2 of the foregoing Chapter, with the exception of those specified in paragraph 3 of Article 2, shall include

- (a) a description of the property restitution of which is demanded;
- (b) when possible, identification of the person possessing such property at the time of filing of the application;
- (c) a description of the facts on which the restitution claim is based.

2. Certified copies of the documents supporting the restitution claim shall be attached to the application or shall be subsequently submitted.

Section 3

1. Applications for compensation pursuant to Article 4 of the foregoing Chapter, with the exception of those specified in paragraph 3 of that Article, shall include

- (a) a description of the property in respect of which compensation is demanded;
- (b) information relating to the identification in Germany of such property;
- (c) information relating to the utilization, consumption, destruction, theft or disposal of such property;
- (d) notice of the amount claimed;
- (e) information concerning any other matters on which the claim is based.

2. Certified copies of the documents supporting the compensation claim shall be attached to the application or shall be subsequently submitted.

Section 4

Proceedings before the Federal Higher Authority shall be free of charge

Section 5

1. The Federal Higher Authority shall conduct the necessary investigations. For this purpose it may on its own motion (von Amts wegen) take evidence by accelerated procedure; in particular, it may hear witnesses, experts and the persons whose rights are affected by the restitution or cause their hearing before a court. Where a hearing under oath appears necessary, such oath shall be sworn before a court. The Federal Higher Authority shall be authorized to accept statements in lieu of oaths (eidesstattliche Versicherungen).

2. In addition to the applying Government, all persons shall be considered parties concerned whose rights would be affected by the restitution.

3. The parties concerned shall be afforded an opportunity to state their views. They may be represented by agents or counsel. They shall be notified of the dates of the hearings ordered for the purpose of interrogations pursuant to the second sentence of paragraph 1 of this Section and may attend these hearings. The documents filed by a party concerned shall be transmitted to the other parties.

Section 6

Where realization of the restitution claim appears to be endangered, the Federal Higher Authority shall order the necessary interim measures to be taken for safeguarding the property.

Section 7

Decisions of the Federal Higher Authority shall state in writing the reasons on which they are based and shall be served upon the parties concerned.

Section 8

1. The Federal Higher Authority shall take all measures required for the restitution. Where necessary the Federal Higher Authority shall order that property to be restituted shall be expropriated in favour of the Federal Republic, which will forward (zuleiten) it to the restitution claimant.

2. The nature and amount of the compensation to persons affected by the expropriation shall be fixed by a Federal law.

3. Where the Federal Higher Authority allows a claim under Article 4 of the foregoing Chapter, it shall fix the amount of the compensation to be paid by the Federal Republic.

CHAPTER SIX—REPARATION

ARTICLE 1

1. The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter. The Three Powers undertake that they will at no time assert any claim for reparation against the current production of the Federal Republic.

2. Pending the final settlement envisaged in paragraph 1 of this Article, the following provisions shall apply.

ARTICLE 2

Control Council Law No. 5 is deprived of effect in the Federal territory, except in respect of the countries listed in the Schedule to Allied High Commission Law No. 63, as amended by Decision No. 24 of the Allied High Commission, but shall not be further deprived of effect or amended without the consent of the Three Powers. The Federal Republic will not repeal or amend Law No. 63 except with the consent of the Three Powers. However, paragraph 1 of Article 6 of Law No. 63 shall be deemed to be repealed and paragraph 2 to be amended to provide that the powers therein conferred upon the Allied High Commission may be exercised by the Federal Government. The Federal Republic undertakes that appropriate decisions under Article 6 of Law No. 63, as so amended, removing the countries from the list in the Schedule thereto shall be issued after the Three Powers have consented.

ARTICLE 3

1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.

2. The Federal Republic shall abide by such provisions regulating German external assets in Austria as are set forth in any agreement to which the Powers now in occupation of Austria are parties or as may be contained in the future State Treaty with Austria.¹

3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraphs 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments.

ARTICLE 4

1. Where German external assets have not been transferred or liquidated, or where no disposition has been made in respect of the proceeds of their

¹ Signed at Vienna May 15, 1955; Sen. Exec. G, 84th Cong., 1st Sess. (1955). See Art. 22 of that treaty.

liquidation, the Federal Republic may negotiate agreements regarding them with all countries which have been at war with Germany since 1 September 1939 but are not members of the Inter-Allied Reparation Agency (IARA).

2. Moreover, the Federal Republic may negotiate agreements with the member countries of IARA, provided such agreements relate only to

- (a) property of the types which member countries of the IARA may, under Part III of the IARA accounting rules, voluntarily exclude from the charge to be made under Part II of the rules;
- (b) securities of German issue expressed in Reichsmarks;
- (c) pensions;
- (d) a final date for sequestration of German property in countries in which such a date has not yet been determined.

3. Regarding property taken as German assets in Portugal, Spain, Sweden and Switzerland, with respect to which agreements concluded by the Three Powers are, or will be, in force, the Federal Republic may negotiate with those countries arrangements in implementation of such agreements concerning the nature and amount of compensation to be paid to former German owners of assets in those countries. The Three Powers shall have the right to participate in such negotiations.

4. Apart from the questions referred to in the preceding paragraphs of this Article, the Federal Republic may, after due notification to the Three Powers, negotiate with any country agreements on other questions concerning German external assets unless the Three Powers specifically object thereto.

ARTICLE 5

The Federal Republic shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated.

CHAPTER SEVEN—DISPLACED PERSONS AND REFUGEES

ARTICLE 1

The Federal Republic undertakes

- (a) [Deleted.]
- (b) [Deleted.]
- (c) [Deleted.]
- (d) to assure the continuance of the operations presently carried out by the International Tracing Service;
- (e) to assume the proper care and maintenance of the graves of Allied civilian war victims (unless otherwise provided for by the nations concerned), displaced persons and non-German refugees in the Federal territory and to facilitate pilgrimages by relatives to these graves;

(f) to afford to the authorities of the Three Powers and other Allied nations concerned the same facilities as they now enjoy for the exhumation and removal of bodies of war victims.

ARTICLE 2

The Federal Republic will see to the proper care and maintenance of the graves of Allied soldiers in the Federal territory, unless otherwise provided for by the nations concerned or by organizations of such nations serving that purpose, and will facilitate the work of such organizations. Each of the Three Powers will see to the proper care and maintenance of the graves of German soldiers in its metropolitan territory and will facilitate the activities of organizations serving that purpose.

ARTICLE 3

[Deleted.]

ARTICLE 4

The Three Powers declare themselves willing to conduct, when the necessity arises, negotiations concerning the transfer of refugees to the Federal territory with the Governments of those countries in which the Federal Republic has no diplomatic representation.

CHAPTER EIGHT—CLAIMS AGAINST GERMANY

[Deleted with Annex.]

CHAPTER NINE—CLAIMS AGAINST FOREIGN NATIONS OR NATIONALS

ARTICLE 1

Without prejudice to the terms of a peace settlement with Germany, German nationals who are subject to the jurisdiction of the Federal Republic shall not assert against countries which have signed or acceded to the United Nations Declaration of 1 January 1942, or have been at war with Germany, or are specified in Article 5 of Chapter Five of the present Convention, or against the nationals of such countries, claims of any description arising out of actions taken or authorized by the Governments of these countries between 1 September 1939 and 5 June 1945 because of the existence of a state of war in Europe, nor shall such claims be asserted in any court of the Federal Republic by any person.

ARTICLE 2

Without prejudice to the terms of a peace settlement with Germany, the Federal Republic confirms that no governmental claims on behalf of Germany arising out of actions taken or authorized by the Governments of the countries referred to in Article 1 of this Chapter between 1 September 1939 and 5 June 1945 because of the existence of a state of war in Europe may be asserted prior to the negotiation of the peace settlement.

ARTICLE 3

1. The provisions of this Article are applicable during the period until the entry into force of a peace settlement with Germany.

2. The Federal Republic recognizes that no claims of any kind arising out of acts or omissions of the Three Powers or any one of them, or of organizations or persons who have acted on their behalf or under their authority, which took place in respect of Germany, German nationals or German property, or in Germany, between 5 June 1945 and the entry into force of the present Convention, may be asserted by the Federal Republic or by persons subject to its jurisdiction against the Three Powers or any one of them or against organizations or persons who have acted on their behalf or under their authority.

3. The Federal Republic assumes responsibility for the decision and satisfaction of claims for compensation for occupation damages which were sustained between 1 August 1945 and the entry into force of the present Convention and for which compensation is payable under the provisions of Allied High Commission Law No. 47, as amended by Allied High Commission Law No. 79. The Federal Republic will determine which of the other claims referred to in paragraph 2 of this Article, insofar as they arose in the Federal territory, should appropriately be satisfied and will take such measures as are necessary for the determination and satisfaction of such claims.

4. The provisions of this Article shall not apply to claims arising under contracts providing for payments from national funds of any of the Three Powers.

5. The Federal Government shall carry out all decisions taken with regard to claims specified in paragraph 3 of this Article by the authorities of the Three Powers or any one of them before the entry into force of the present Convention unless such decisions have already been carried out.

ARTICLE 4

1. Pursuant to the terms of the agreement embodied in the exchange of letters between the Chairman of the Allied High Commission and the Federal Chancellor of the Federal Republic of Germany of 19 and 21 May 1952, assets of the Joint Export-Import Agency have been or will be transferred to the Federal Republic, and the Federal Republic has undertaken certain obligations.

2. The Federal Republic confirms its undertaking in accordance with such exchange of letters to indemnify the Three Powers and each of them with respect to all liabilities, either now existing or hereafter arising, in connection with the operations of the Joint Export-Import Agency or any agency whose functions were taken over by it or in connection with other foreign trade or foreign exchange operations conducted by the Three Powers or any of them and referred to in the exchange of letters.

3. The provisions of the exchange of letters referred to in paragraph 1 of this Article shall be subject, in the event of a dispute arising after

the date of the exchange, to the jurisdiction of the Arbitration Tribunal in the same manner as the present Convention.

CHAPTER TEN—FOREIGN INTERESTS IN GERMANY

ARTICLE 1

1. Insofar as this has not already been done, the Federal Republic will take all steps necessary to ensure that the nations, persons and companies referred to in paragraph 3 of this Article shall be able to secure the return of their property in its present condition, and the restoration of their rights and interests in the Federal territory to the extent to which such property, rights or interests suffered discriminatory treatment. The property, rights and interests of the nations, persons and companies referred to in paragraph 3 shall be freed by the Federal Republic from all encumbrances and charges of any kind to which they may have become subject as a result of discriminatory treatment. No costs shall be imposed either in connection with the return or restoration or with the removal of encumbrances or charges. Equitable conditions may, however, be imposed to prevent the unjust enrichment of any nation, person or company referred to in paragraph 3.

2. On the entry into force of the present Convention, the Federal Republic shall establish, and give adequate publicity to, the procedure described in the Annex to this Chapter for the filing and consideration of claims based on the provisions of this Article and for the satisfaction of awards based on such claims. Such claims shall be filed within twelve months from the establishment of such procedure. The Federal Republic shall also make available, so far as possible, all information concerning the administration by custodians of property, rights or interests to any interested party who may request it.

3. The following shall be entitled to claim under the provisions of this Article:

- (a) United Nations and their nationals,
- (b) the successors of such nationals, and
- (c) companies organized under German law in which United Nations nationals own participation,

provided that such nationals or, except in the case of direct successors by inheritance or testamentary disposition, their successors were United Nations nationals at the date of the discriminatory treatment.

4. The term "discriminatory treatment" as used in this Article shall mean action of all kinds applied between 1 September 1939 and 8 May 1945 to any property, rights or interests, as a result of any exceptional measures which were not applicable generally to all non-German property, rights or interests, and giving rise to prejudice, deprivation or impairment without the free consent of the interested parties and without adequate compensation. Anything done or omitted under the German Ordinance on the Treatment of Enemy Properties of 15 January 1940 or any amend-

ment thereto, or any other regulations having a similar purpose, may be held to amount to discriminatory treatment, even though within the scope of such Ordinance, amendments or regulations, where it appears that

(a) injury to foreign property, rights or interests resulted therefrom; and

(b) the injury inflicted could have been avoided without infringing such Ordinance, amendments or regulations.

5. The provisions of this Article are not applicable to claims which are dealt with under Chapters Three and Four of the present Convention.

6. The provisions of this Article are not intended to cover compensation for loss or damage to property, rights or interests due to discriminatory treatment or resulting indirectly or directly from the war by any other means, but shall not affect the right of any of the United Nations to advance during negotiation for a peace settlement any claim for compensation of this nature with respect to its own or its nationals' property, rights or interests.

ARTICLE 2

Insofar as they affect foreign creditors of German debtors, the Federal laws on periods of limitation (including preclusion and prescription) of 28 December 1950 and 30 March 1951 (Gesetz ueber den Ablauf der durch Kriegs- oder Nachkriegsvorschriften gehemmten Fristen and Gesetz zur Ergaenzung des Gesetzes ueber den Ablauf der durch Kriegs- oder Nachkriegsvorschriften gehemmten Fristen (Bundesgesetzblatt Teil I, 1950, Seite 821 and 1951, Seite 213), together with Allied High Commission Law No. 67 on the same subject, shall be maintained in force. This legislation shall be reviewed by the Federal Republic in agreement with the other Signatory States on the basis of the provisions of the Agreement on German External Debts, concluded in London on 27 February 1953, insofar as this legislation involves claims dealt with in that Agreement.

ARTICLE 3

Without prejudice to the terms of the final peace settlement with Germany, the United Nations and their nationals shall enjoy, on the same basis as German nationals residing in the Federal territory, such compensation for war damage relating to property located in the Federal territory as may be provided by the Federal Republic or any of its Länder, but not Integration Aid (Eingliederungshilfe) or Housing Aid (Wohnraumhilfe).

ARTICLE 4

The Federal Republic reaffirms that under German law the state of war shall not in itself be regarded as affecting obligations to pay pecuniary debts arising out of obligations and contracts which existed, and rights which were acquired, before the commencement of the state of war.

ARTICLE 5

Any United Nations national, or the successor of such a national who is also a United Nations national, shall have the right to institute, within one year from the entry into force of the present Convention, an action for the revision of any judgment delivered by a German Court between 1 September 1939 and 8 May 1945 in any proceeding in which such national was a party and was physically, morally or legally unable to make adequate presentation of his case.

ARTICLE 6

1. Pending a final settlement of claims against Germany arising out of the war, the persons defined in paragraph 2 of this Article, and their property, shall be exempt from any exceptional taxes, levies or imposts, the incidence of which is in fact on property, imposed for the specific purpose of meeting charges arising out of the war or out of reparation or restitution to any of the United Nations.

2. Where any such tax, levy or impost is levied only partly for the purposes described in paragraph 1 of this Article, the exemption to be granted shall in principle be proportionate to the part of such taxes, levies or imposts imposed for these purposes. In the particular cases of the levies prescribed by the legislation of the Bizonal Economic Council and by the corresponding legislation of the Länder of Rhineland-Palatinate, Baden and Wuerttemberg-Hohenzollern, concerning Immediate Aid (Soforthilfe) and by the Law on Equalization of Burdens of 14 August 1952 (Bundesgesetzblatt Teil I Seite 446), the persons and property described in the following provisions of this Article shall be exempted, to the extent provided, from payments falling due in the six-year period from 1 April 1949 to 31 March 1955 as Immediate Aid levies, and as the property levy under the Equalization of Burdens:

(a) natural persons who were nationals of any of the United Nations on the currency reform date (21 June 1948), and companies, associations of persons and trusts (Koerperschaften, Personenvereinigungen und Vermoegensmassen), which are independently liable for taxation under German law, organized under the laws of one of the United Nations, shall, if subject to unlimited tax liability, be exempted in respect of all property owned by them both on 21 June 1948 and on 8 May 1945 or, if subject to limited tax liability, in respect of all property owned by them in the Federal Republic or Berlin (West). Citizens of any territorial entity or nation referred to in sub-paragraph (c) of Article 1 of Allied High Commission Law No. 54 shall enjoy the same exemption if they had the nationality of any of the United Nations at any time between 1 September 1939 and 21 June 1948;

(b) companies organized under German law, which are independently liable for taxation, in which the natural persons or companies, associations of persons or trusts described in sub-paragraph (a) of

this paragraph owned on 21 June 1948 and on 8 May 1945, directly or through the medium of other companies, a shareholding interest of at least 85 per cent shall be exempted in proportion to such shareholding interest;

(c) natural persons who do not qualify for exemption under sub-paragraph (a) of this paragraph and who claim or have claimed restitution or compensation pursuant to the legislation referred to in sub-paragraph (a) of paragraph 1 of Article 1 of Chapter Three of the present Convention shall be exempted on the first DM 150,000 in value or amount of property of any kind which has been or will be transferred to them under orders, decisions or recorded agreements pursuant to such legislation which would be taxable under the provisions concerning Immediate Aid levies or the property levy under the Equalization of Burdens;

(d) the exemptions prescribed in sub-paragraphs (a) to (c) inclusive of this paragraph shall not become inoperative on the ground that the property concerned has devolved upon other persons on or after 21 June 1948.

3. For the purposes of sub-paragraph (a) of paragraph 2 of this Article, property which the owner on 21 June 1948 did not own on 8 May 1945 shall be deemed to have been owned by him on 8 May 1945 if

(a) the property was owned on 8 May 1945 by a person (of any nationality), from whom he acquired it through succession on death (by one or a series of inheritances or testamentary dispositions); or

(b) he acquired the property after 8 May 1945 in exchange for other property owned by him on that date (for example, through purchase); or

(c) the property concerned is restituted property of any kind, without limitation as to the value or amount, referred to in sub-paragraph (c) of paragraph 2 of this Article.

4. For the purposes of sub-paragraph (b) of paragraph 2 of this Article, the provisions of paragraph 3 of this Article shall be applicable *mutatis mutandis*.

5. Where payments made under the provisions of the Immediate Aid by natural persons, companies, associations of persons and trusts entitled to exemption under paragraph 2 of this Article exceed amounts of the property levy falling due for the same period taking into account the provisions of paragraph 2, the overpayment shall, not later than three months after the effective date of the notice of assessment issued by the German tax office concerning the property levy, be either refunded or set off against liabilities due for payment or which become due within three months thereafter.

6. In cases in which natural persons, companies, associations of persons or trusts enjoy exemption from the property levy by virtue of this Article, the annual amount to be paid in respect of the property levy for the period after the expiration of the exemption period shall not, either be-

cause of this exemption or because of the non-payment of the property levy or the Immediate Aid levy, be higher than the annual amount which would be payable by non-exempted natural persons, companies, associations of persons or trusts who have paid the Immediate Aid levy in full. If in computing the property levy the Immediate Aid levy is to be set off in the manner proposed in the draft law submitted to the Bundestag (Bundestag Document No. 3300), that is, by deduction of the Immediate Aid levy from the total liability for the property levy, then in cases where the Immediate Aid levy has not been imposed, three times the basic annual payment under the property levy is to be deducted from the total liability; the basic annual payment shall for this purpose be the amount resulting from the application of the annual contribution rates to the total liability.

7. In computing the liability for the purposes of any other levy under the Equalization of Burdens Law, natural persons, companies, associations of persons and trusts enjoying the exemptions under this Article shall be treated as though they had paid the full amount of property levy.

8. In cases under sub-paragraph (b) of paragraph 2 of this Article both the company, and any shareholder who believes the company should be exempted with respect to his participation, shall be entitled to all legal remedies available.

ARTICLE 7

In order to protect the interests of Foreign nationals, the following legislation shall be maintained in force:

(a) in the field of Monetary Reform legislation:

(i) [Deleted.]

(ii) Allied High Commission Laws No. 57 (Status of Certain Financial Institutions under Currency Reform Legislation) and No. 65 (Third Amendment of Legislation Concerning Monetary Reform) which supplement, amend and interpret the Conversion Laws;

(b) [Deleted.]

(c) in other fields:

(i) [Deleted.]

(ii) [Deleted.]

(iii) Allied High Commission Law No. 34 on Application of Land Reform to the Property of Non-German Nationals, as amended by Allied High Commission Laws Nos. 50, 60, 64 and 72; these laws shall, however, be deemed to be further amended as follows:

(1) the period of one year commencing on the date of acquisition provided for in paragraph 2 of Article 2 of Law No. 34 shall, in respect of an acquisition by inheritance or testamentary disposition, apply only to an acquisition which has taken place prior to 31 December 1952;

(2) an owner of land, whose possession of non-German nationality was in dispute and who for this reason was

not in a position to dispose of his land prior to 29 February 1952 pursuant to paragraph 1 of Article 2 of Allied High Commission Law No. 34, may within a period of one year commencing on the date on which it was or will be established that he did not possess German nationality, dispose of his land;

(3) owners of land who were of German as well as of non-German nationality shall within the meaning of these laws, be deemed to be non-German nationals, if at any time between 1 September 1939 and 8 May 1945 their property was subject to any of the provisions of the German Ordinance on the Treatment of Enemy Properties of 15 January 1940 or any amendment thereto, or any other regulations having a similar purpose. In such case disposition of the land shall be permissible until 31 December 1952.

ARTICLE 8

1. Allied High Commission Law No. 8 on Industrial, Literary and Artistic Property Rights of Foreign Nations and Nationals, as amended by Allied High Commission Laws Nos. 30, 39, 41 and 66, together with the First and Second Implementing Ordinances under Allied High Commission Law No. 8 of 8 May 1950 and 9 November 1950 (Bundesgesetzblatt Seite 357 und Seite 785), shall be maintained in force.

2. However, the provisions of Allied High Commission Law No. 8, as amended, governing the settlement of disputes arising out of the application of that Law, shall be deemed to be amended as follows:

(a) An appeal may be taken to the Arbitral Commission on Property, Rights and Interests in Germany referred to in Article 12 of this Chapter from any decision of last instance of the Patent Office or of its Grand Senate or from any decision in the first instance of the regular courts, in accordance with the provisions of Article 12 of this Chapter and the Charter of the Arbitral Commission.

(b) The powers of the Occupation Authorities under the last sentence of Article 2 and paragraph 3 of Article 7 of Law No. 8 shall lapse.

ARTICLE 9

1. For the purposes of this Chapter, the term "United Nations" shall have the same meaning as in Allied High Commission Law No. 54, which is maintained in force for those purposes.

2. For the purposes of this Chapter, the term "United Nations nationals" shall, except as otherwise herein provided, mean:

(a) natural persons who are nationals of any of the United Nations. Natural persons who have the nationality of one of the United Nations and also German nationality shall be deemed to be ex-

clusively nationals of the United Nations if, at any time between 1 September 1939 and 8 May 1945, their property in Germany was subject to any of the provisions of the German Ordinance on the Treatment of Enemy Properties of 15 January 1940 or any amendment thereto, or any other regulations having a similar purpose, unless it was exempted therefrom by specific permission of the Reich Minister of Justice;

(b) juristic persons or associations of persons established under the laws of one of the United Nations.

ARTICLE 10

If the Federal Republic concludes with any other Power, on matters within the scope of Articles 1 to 9 inclusive of this Chapter, arrangements more favourable to such other Power than the corresponding provisions of those Articles, the benefits of such new arrangements shall automatically be extended to all Powers benefiting from the corresponding provisions of those Articles.

ARTICLE 11

In the expectation that such a policy will be applied by such Nations toward the Federal Republic, the Federal Republic declares its intention to pursue a general policy of non-discrimination toward the United Nations and their nationals and toward the property, rights and interests of such Nations and nationals, and in general to accord national and most-favoured nation treatment in matters affecting such Nations and nationals and their property, rights and interests in the field of establishment and navigation. The Federal Republic further declares its readiness to enter into treaties with the United Nations based on these principles.

ARTICLE 12

1. The following decisions may be appealed to the Arbitral Commission on Property, Rights and Interests in Germany, referred to in Article 7 of Chapter Five of the present Convention, in accordance with the provisions of its Charter, upon application to the Commission by the party concerned within thirty days after the service thereof:

(a) decisions under Article 1 of this Chapter of the Federal Higher Authority referred to in the Annex thereto;

(b) decisions of an administrative court of first instance in regard to discriminatory treatment under Article 3;

(c) decisions of German courts of first instance (regular courts, administrative courts, finance courts or other courts) relating to the application of Articles 2, 4 and 5;

(d) decisions of the finance courts of first instance under Article 6;

(e) decisions of the regular courts of first instance in contentious or non-contentious matters under Article 7;

(f) decisions of the last instance of the German Patent Office or its Grand Senate under Allied High Commission Law No. 8 or decisions of the regular courts of first instance under that Law pursuant to Article 8.

Appeals under the last sentence of Article 2 and paragraph 3 of Article 7 of Allied High Commission Law No. 8, pending on the entry into force of the present Convention before the Patent Appeal Board established by Regulation No. 1 under Law No. 8 (amended), are hereby transferred to the Arbitral Commission and shall be dealt with by it in the same manner as appeals under this Article.

Appeal to the Arbitral Commission pursuant to sub-paragraphs (b) to (f) inclusive of this paragraph shall not bar the continuance of proceedings before the German courts and authorities on other issues in dispute. If, however, the Commission deems it necessary in order to protect the interests of a party to the proceeding it may order the stay of further proceedings before the German courts or authorities pending the Commission's decision on the question referred to it.

2. If the party affected by a decision referred to in sub-paragraphs (b) to (f) inclusive of paragraph 1 of this Article appeals from the decision to a German court instead of appealing to the Arbitral Commission, such party may not appeal thereafter to the Arbitral Commission against the decision of the German court of higher instance on points on which he could have appealed to the Arbitral Commission. If, in a decision referred to in sub-paragraphs (b) to (f) inclusive of paragraph 1, the requirements for an appeal to the Arbitral Commission did not exist, but if a German court of higher instance renders a decision which in the opinion of the party concerned violates the Articles of this Chapter referred to in paragraph 1, such party may appeal from the decision of the higher German court to the Arbitral Commission.

3. The Commission shall also be authorized to render a decision in any case referred to in paragraph 1 of this Article where the appropriate German court or authority has not rendered a final decision within one year following submission to it and where the party concerned submits the matter for the decision of the Commission within thirty days after the expiration of that year.

4. In any case referred to in paragraphs 1, 2 or 3 of this Article, the Commission may render a final decision or may remand the case to the court or authority concerned, with such instructions as the Commission deems necessary or appropriate.

5. Decisions and instructions of the Commission shall be final and binding on all German courts and authorities.

ANNEX TO CHAPTER TEN

Section 1

1. The Federal Government shall establish a Federal Higher Authority (Bundesoberbehörde) to receive, to consider and to decide on ap-

plications for return and restoration under paragraph 2 of Article 1 of the foregoing Chapter. The Federal Government may issue regulations for carrying out the provisions of this Annex.

2. All German courts and authorities shall render the Federal Higher Authority legal and other official assistance pursuant to Article 35 of the Basic Law.

Section 2

1. Applications for return or restoration shall be made in writing, or by oral statement to be recorded, to the Federal Higher Authority.

2. Applications shall include

(a) first name, last name and address of the claimant and of his predecessor in title when applicable;

(b) description of the discriminatory measure and of the property, rights or interests affected by it;

(c) nationality of the claimant and of his predecessor in title, when applicable, at the time of the discriminatory measure.

3. Applications shall, if possible, include information concerning the person to whom the property, rights or interests were transferred, and concerning the person holding the property, rights or interests at the time of filing of the application.

4. Furthermore, all information and documents available to the claimant which refer to the property, rights or interests and to the discriminatory measure taken in respect of the property, rights or interests shall be attached to the application in the original or in a certified copy. On request, the original shall be submitted.

Section 3

Proceedings before the Federal Higher Authority shall be free of charge, except where frivolous or obviously unfounded applications are involved.

Section 4

1. The Federal Higher Authority shall on its own motion (von Amts wegen) conduct the necessary investigations. For this purpose it may take evidence, in particular hear witnesses, experts and the parties concerned or cause their hearing before a court. Where a hearing under oath appears necessary, such oath shall be sworn before a court. The Federal Higher Authority shall be authorized to accept statements in lieu of oaths (eidesstattliche Versicherungen).

2. In addition to the claimants, all persons shall be considered parties concerned whose rights would be affected by the return or restoration.

3. The parties concerned shall be afforded an opportunity to state their views. They may be represented by agents or counsel. They shall be notified of the dates of the hearings ordered for the purpose of inter-

rogation, pursuant to the second sentence of paragraph 1 of this Section, and may attend these hearings. The documents filed by a party concerned shall be transmitted to the other parties.

Section 5

Where realization of the return or restoration claim appears to be endangered, the Federal Higher Authority shall order the necessary interim measures to be taken for safeguarding the property, rights or interests.

Section 6

The Federal Higher Authority shall use its good offices to bring about an amicable settlement between the parties concerned. A compromise reached by the parties shall be recorded.

Section 7

Decisions of the Federal Higher Authority shall state in writing the reasons upon which they are based and shall be served upon the parties concerned.

Section 8

1. The Federal Higher Authority shall take all measures required for the return and restoration or shall determine which measures shall be taken by the authority competent in the circumstances of the case.

2. The Federal Higher Authority shall, in particular, be empowered to order, where necessary for the purpose of return or restoration, expropriation in favour of the Federal Republic, which shall effect the return or restoration. The nature and amount of the compensation to persons affected by the expropriation shall be fixed by a Federal law.

CHAPTER ELEVEN—FACILITIES FOR THE EMBASSIES AND CONSULATES OF THE THREE POWERS IN THE FEDERAL REPUBLIC

[Deleted.]

CHAPTER TWELVE—CIVIL AVIATION

ARTICLE 1

The Federal Republic will assume full responsibility in the field of civil aviation in the Federal territory, subject to the provisions of Articles 2 to 6 inclusive of this Chapter and of any other agreement between the Three Powers and the Federal Republic which enters into force simultaneously with the present Convention.

ARTICLE 2

The Federal Republic undertakes to adhere to the Convention on International Civil Aviation drawn up in Chicago in 1944 as soon as it is possible for it to do so in accordance with the terms of that Convention. Pending such adherence, the Federal Republic undertakes

(a) to apply and abide by the provisions of the Convention on International Civil Aviation and the International Air Services Transit Agreement of 1944, with respect to any other State which has declared its willingness to extend reciprocal treatment to the Federal Republic and which maintains diplomatic relations with the Federal Republic. The Federal Republic will make known its position in this respect to the States concerned and will enter into appropriate arrangements necessary to put this undertaking into effect;

(b) to apply to the international civil aviation operations into and through the air space of the Federal Republic the fundamental principles of international air navigation and the standards, procedures and recommended practices as provided for by the Convention on International Civil Aviation of 1944;

(c) to accord to aircraft of foreign countries which may be granted rights to engage in air services or to operate in the air space of the Federal Republic, in the exercise of those rights, the same rights and privileges with respect to the use of air navigation and other facilities in the Federal Republic as are or would be accorded to civil aircraft of the Federal Republic in similar operations.

ARTICLE 3

The Federal Republic agrees to pursue, in its bilateral air transport agreements and arrangements, a liberal and nondiscriminatory policy.

ARTICLE 4

1. The Federal Republic will permit the air carriers of any State to continue their operations, including cabotage, in the Federal territory on a basis not less favourable than that enjoyed by them on the entry into force of the present Convention. Such permission shall not be withdrawn for a period of one year from the entry into force of the present Convention or until the coming into effect of air transport agreements or other authorization agreed with such State, whichever is earlier, provided that, where negotiations for an air transport agreement or other authorization have been begun or proposed by either party within such period of one year, such permission shall not be withdrawn before agreement has been reached thereon or, in event of failure to reach agreement, until the expiry of one year from the date of the proposal by either party for negotiations.

2. With respect to cabotage, such privileges may nevertheless be withdrawn if and when a German airline provides service adequate to meet

public needs over a route or routes now serviced through the cabotage privileges of a foreign air carrier. Any change not involving withdrawal of cabotage privileges enjoyed on the entry into force of the present Convention shall be subject to the provisions of paragraph 1 of this Article and shall be made in accordance with the relevant principles and provisions of the Convention on International Civil Aviation.

3. The term "German airline" means an airline substantially owned and effectively controlled by German nationals or governmental authorities.

ARTICLE 5

1. In the exercise of their responsibilities with respect to Berlin, the Three Powers will continue to regulate all air traffic to and from the Berlin air corridors established by the Allied Control Authority. The Federal Republic undertakes to facilitate and assist such traffic in every way on a basis no less favourable than that enjoyed on the entry into force of the present Convention; it undertakes to facilitate and assist unlimited and unimpeded passage through its air space for aircraft of the Three Powers en route to and from Berlin. The Federal Republic agrees to permit any necessary technical stops by such aircraft and further agrees that such aircraft may carry passengers, cargo and mail between places outside the Federal Republic and Berlin and between the Federal Republic and Berlin.

2. Nothing in this Article shall confer or affect any cabotage privileges within the Federal territory.

ARTICLE 6

In the exercise of their responsibilities relating to Germany as a whole, the Three Powers will continue to exercise control with respect to aircraft of the Union of Soviet Socialist Republics utilizing the air space of the Federal Republic.

IN FAITH WHEREOF the undersigned representatives duly authorized thereto by their respective Governments have signed the present Convention, being one of the related Conventions listed in Article 8 of the Convention on Relations between the Three Powers and the Federal Republic of Germany.

Done at BONN this twenty-sixth day of May, 1952, in three texts, in the English, French and German languages, all being equally authentic.

For the United States of America:

signed: DEAN ACHESON

For the United Kingdom of Great Britain and Northern Ireland:

signed: ANTHONY EDEN

For the French Republic:

signed: ROBERT SCHUMAN

For the Federal Republic of Germany:

signed: ADENAUER

ANNEX TO THE CONVENTION ON THE SETTLEMENT OF MATTERS ARISING OUT
OF THE WAR AND THE OCCUPATION

CHARTER OF THE ARBITRAL COMMISSION ON PROPERTY,
RIGHTS AND INTERESTS IN GERMANY¹

PART I—DURATION, SEAT, COMPOSITION AND ORGANIZATION

ARTICLE 1

1. The Commission is established for a period of ten years to run from the entry into force of the present Charter.

2. This period may be curtailed or extended by agreement between the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic (hereinafter referred to as "the Three Powers") and of the Federal Republic of Germany (all collectively hereinafter referred to as "the Signatory States").

3. After the date of expiration of this period, the Commission will continue to function to complete the determination of any cases pending before it at that date.

ARTICLE 2

The seat of the Commission shall be at the seat of the Arbitration Tribunal referred to in Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany. The Commission may, however, sit and exercise its functions elsewhere when it deems it desirable to do so.

ARTICLE 3

1. The Commission shall be composed of nine permanent members who shall have the qualifications required in their respective countries for appointment to judicial office or equivalent qualifications.

2. The nine permanent members of the Commission shall be appointed as follows:

(a) three members appointed by the Governments of the Three Powers, one by each Government;

(b) three members appointed by the Federal Government; and

(c) three members (hereinafter referred to as "the neutral members") appointed by agreement between the Governments of the Three Powers and the Federal Government, none of whom shall be a national of any State which participated in the War.

3. The Governments of the Three Powers and the Federal Government shall make known their first appointments not later than thirty days after the entry into force of the present Charter. Within the same period, the Governments of the Three Powers and the Federal Govern-

¹ Sen. Execs. Q and R, 82d Cong., 2d Sess., p. 81.

ment shall agree upon the three neutral members. If, after the expiry of such period, one or more of the neutral members shall not have been appointed, either the Governments of the Three Powers or the Federal Government may request the President of the International Court of Justice to appoint such neutral member or members.

4. Appointments to fill vacancies shall be made in the same manner as the appointment of the permanent member to be replaced. However, if a vacancy to be filled by the Government of one of the Three Powers or the Federal Government is not so filled within one month of its occurring, either the Governments of the Three Powers or the Federal Government may request the President of the International Court of Justice to make an interim appointment to the vacancy of a person who shall not be a national of any State which participated in the War and who shall serve for a period of six months or until the vacancy is filled in the normal manner, whichever is longer. If the member to be replaced is a neutral member, the Governments of the Three Powers or the Federal Government may request the President of the International Court of Justice to make such appointment, if the agreement envisaged by subparagraph (c) of paragraph 2 of this Article has not been reached within one month of the vacancy occurring.

5. The Commission may, by majority vote, declare a vacancy if, in its opinion, a member has, without reasonable excuse, failed or refused to participate in the hearing or decision of a case to which he has been assigned.

6. The Government of any State which has acceded to the present Charter pursuant to Article 17 hereof may appoint a member adjoint by notification addressed to the Governments of the Three Powers and the Federal Government. Any such member adjoint shall meet the requirements specified in paragraph 1 and shall be subject to the provisions of paragraph 5 of this Article. The appointing Government may fill a vacancy by notification addressed to the Governments of the Three Powers and the Federal Government.

7. The Secretariat of the Arbitration Tribunal shall serve the Commission as its administrative office.

ARTICLE 4

1. The permanent members shall be appointed for the duration of the Commission including the additional period provided for in paragraph 3 of Article 1 of the present Charter. Members adjoint may be appointed for shorter periods or for particular cases.

2. Members of the Commission shall not engage in any activity incompatible with the proper exercise of their duties, nor shall they participate in the adjudication of any case with which they have previously been concerned in another capacity or in which they have a direct interest. Differences of opinion regarding the applicability of this paragraph shall be resolved by the Commission.

3. (a) During and after their terms of office, the members of the Commission shall enjoy immunity from suit in respect of acts performed in the exercise of their official duties.

(b) The members of the Commission who are not of German nationality shall, moreover, enjoy in the Federal territory the same privileges and immunities as are accorded members of diplomatic missions. If sittings or official acts take place in the territory of one of the Three Powers, the members of the Commission who are not of the nationality of the country in which the sitting or act takes place shall enjoy diplomatic privileges and immunities in such country.

4. Every member of the Commission shall, before taking office, make a declaration at a public session that he will exercise his duties impartially and conscientiously.

5. Subject to the provisions of paragraph 5 of Article 3 of the present Charter, no member may be dismissed before the expiry of his term of office, except by agreement between the Governments of the Three Powers and the Federal Government and,

(a) in the case of a member appointed by the Government of an acceding State, with the agreement of such Government;

(b) in the case of a member appointed by the President of the International Court of Justice, with the consent of its President.

6. Any member may at any time resign his office by giving due notice thereof under his hand to the appointing Government or Governments and to the President of the Commission. But he shall continue in office until his successor has taken his seat, unless the appointing Government or Governments and the President agree otherwise.

ARTICLE 5

1. The Commission shall elect its President from the three neutral members to serve for two years. The President shall be eligible for re-election. If the President shall cease to be a member of the Commission, the Commission shall elect a new President after his successor as a member of the Commission has been appointed. The remaining neutral members shall serve as Vice-Presidents.

2. The Commission, presided over by the President or one of the Vice-Presidents, shall sit either in plenary session or in Chambers of three members.

3. A plenary session shall, in principle, include all the permanent members of the Commission. A quorum of five members shall suffice to constitute a plenary session; it shall be composed of an uneven number of members, and in any case shall consist of an equal number of the members appointed by the Governments of the Three Powers and of those appointed by the Federal Government, and at least one neutral member. Members adjoint shall not take any part in a plenary session.

4. (a) Chambers shall be composed of one of the members appointed by the Governments of the Three Powers, one of the members appointed by the Federal Government and one neutral member. The Commission in plenary session shall nominate the members of such Chambers, define the categories of cases with which a Chamber will be concerned or assign a particular case to a Chamber. Subject to the provisions of paragraph 5 of Article 13 of the present Charter, any decision of a Chamber, on a case assigned to it, shall be deemed to be a final decision of the Commission.

(b) In cases heard by Chambers where any of the parties is one of the Three Powers or its national or resident, the member appointed by the Government of such Power shall sit unless such party otherwise agrees.

(c) In cases heard by Chambers, other than those referred to in sub-paragraph (b) of this paragraph,

(i) where any of the parties is one of the acceding States or its national or resident, the member appointed by the Government of one of the Three Powers shall be replaced by the member adjoint appointed by the Government of such acceding State upon the latter's application to the President;

(ii) where more than one of the parties are acceding States or nationals or residents of acceding States, such States, nationals or residents may agree to the replacement of the member appointed by the Government of one of the Three Powers by one of the members adjoint appointed by the Governments of the States which, or whose nationals or residents, are parties, and such replacement shall be made upon application of all the States, nationals or residents concerned. In default of such agreement, the member appointed by the Government of one of the Three Powers shall sit in the Chamber.

5. The Commission shall sit in public unless it decides otherwise. The deliberations of the Commission shall be and shall remain secret as shall all facts brought to its attention in closed session.

PART II—COMPETENCE, POWERS AND APPLICABLE LAW

ARTICLE 6

1. The Commission shall have jurisdiction in all disputes envisaged under Article 7 of Chapter Five and Article 12 of Chapter Ten of the Convention on the Settlement of Matters Arising out of the War and the Occupation (hereinafter referred to as "the Convention"). Subject to the provisions of paragraph 2 of Article 9 and of Article 10 of the Charter of the Arbitration Tribunal, the Commission may decide questions as to the extent of its jurisdiction. The President of the Commission may ask the Arbitration Tribunal for an advisory opinion, under Article 25 of its Charter, as to the extent of the jurisdiction of the Commission.

2. The jurisdiction, in the first instance or on appeal, as the case may be, of the Commission in disputes within its competence which are submitted to it shall be exclusive and no court or tribunal of the Signatory States or of any other State, nor any other national or international body shall have jurisdiction in such disputes.

3. The Commission shall also have jurisdiction in any other matter which may be referred to it from time to time by agreement between the Signatory States. If any acceding State is directly concerned in the matter, the consent of its Government shall also be necessary.

4. Disputes within the jurisdiction of the Commission may be submitted by any of the Signatory States or any State which has acceded to the present Charter, by a national or resident of any such State or of any territorial entity which is administered or controlled by any such State or for whose international relations such State is responsible, or by a juristic person established under the laws of any such State or territorial entity.

5. The Commission shall be competent to decide questions of law and fact.

ARTICLE 7

1. The Commission or, in a case of urgency, the President shall have the power to issue such orders as may be necessary to conserve the respective rights of the parties pending the judgment of the Commission. Any orders issued by the President under this Article may be confirmed, amended or annulled by the Commission within seventy-two hours after the notification thereof to the parties.

2. Any party affected by such an order of the Commission or of the President who shall not have been heard prior to the making thereof may apply to the Commission for the amendment or annulment of the order at such time and in such manner as may be prescribed in the rules of procedure envisaged in Article 14 of the present Charter.

ARTICLE 8

In arriving at its decisions, the Commission shall apply the provisions of the Convention and of legislation made applicable thereby. Where necessary to supplement or interpret such provisions, or in the absence of any relevant provisions, it shall apply the general principles of international law and of justice and equity.

PART III—PROCEDURE

ARTICLE 9

1. The official languages of the Commission shall be French, English and German. However, the President may, with the consent of the parties, direct that only one or two of these languages shall be used in the proceedings in any cause.

2. Decisions of the Commission shall be delivered in all three languages.

ARTICLE 10

Proceedings before the Commission shall be instituted by a written complaint which shall contain a statement of the facts giving rise to the dispute and the arguments put forward by the complainant. Unless the Commission decides otherwise, an answer to the complaint shall be filed within one month of the service of the complaint. Further pleadings, if any, shall be filed as the Commission may direct.

ARTICLE 11

1. States as parties to the proceedings before the Commission shall be represented by agents. They may be assisted by counsel.

2. Natural persons may appear before the Commission either in person or by counsel, and juristic persons either by authorized representatives or by counsel.

3. Any government agent shall be authorized to present orally and in writing arguments and submissions in cases to which a national or resident of his State is a party.

4. The Commission may prescribe the qualifications which counsel must possess in order to be admitted.

5. The agents, counsel and representatives referred to in this Article shall enjoy immunity from suit in respect of acts performed in the exercise of their duties. Any natural persons appearing in person shall enjoy the same immunity.

ARTICLE 12

The Commission shall have power to demand the production of evidence, documentary or other, to require the attendance of witnesses to testify, to request expert opinion, and to direct inquiries to be made. To this end the Commission may request the aid of the courts of any Signatory or acceding State.

ARTICLE 13

1. All decisions of the Commission shall be in the form of judgments or orders and shall be by majority vote of the members taking part.

2. Subject only to this Article and to paragraph 2 of Article 9 and Article 10 of the Charter of the Arbitration Tribunal, all final judgments and orders of the Commission shall be binding on all parties and shall not be subject to appeal.

3. All judgments shall be delivered in writing and in open court. They shall include a statement of the facts and the reasons on which they are based.

4. Final decisions of the Commission in plenary session shall not be subject to appeal. The final decision on a case assigned to a Chamber must be taken by the Arbitral Commission in plenary session if the Chamber, before it has pronounced a final decision, decides to refer the case to the plenary session.

5. Decisions of the Chambers may, by leave of the Chamber or the plenary session, be appealed on the law to the plenary session. Leave to appeal shall be sought within thirty days from the time the written decision is served upon the party, and such leave shall lapse if no appeal is lodged within thirty days from the date on which it is granted.

6. An appeal shall always lie to the plenary session or the Chamber from any order made by a member of the Commission sitting singly, within thirty days after service of such order upon the party concerned.

7. The revision of a final decision may not be requested of the Commission except upon the grounds of the discovery of a fact which is of such a nature as to exercise a decisive influence, and of which the Commission and the party requesting revision had been unaware before the pronouncement of the decision. The Commission sitting in plenary session shall decide whether such a revision is warranted.

ARTICLE 14

1. The proceedings shall consist of two parts: written and oral. Oral proceedings may be dispensed with if both parties so request.

2. The Commission shall determine rules of procedure consistent with the present Charter. These rules may provide for the rendering of judgments on default if a party fails to appear or to file pleadings. They may also provide for the assignment to any member of the Commission of special duties.

ARTICLE 15

1. The Commission may adopt rules of assessment for court costs, including rules enabling persons to sue or be sued *in forma pauperis*.

2. In general, each party to a proceeding shall pay its own costs. However, the Commission may make an order as to the costs of parties in exceptional cases, recording its reasons as a part of the judgment, where the proceedings have been found to be malicious or vexatious.

PART IV—ADMINISTRATION AND EXPENSES

ARTICLE 16

1. Each of the Signatory States and any State acceding to the present Charter shall bear the full charge by way of salary and allowances of each of the members of the Commission appointed by itself.

2. The operating costs of the Commission (including the salaries and allowances of the neutral members) shall be borne equally by the Three Powers, on the one hand, and the Federal Republic, on the other.

3. The administration of the Commission, the accommodations of the Commission, its members and its staff, the salaries and allowances of the neutral members, staff appointments and staff salaries shall be regulated by a subsidiary administrative agreement between the Signatory States.

PART V—FINAL CLAUSES

ARTICLE 17

1. The present Charter shall enter into force on the entry into force of the Convention.

2. Any State may accede to the present Charter by written notification addressed to each of the Signatory States through diplomatic channels and by the deposit with the Federal Government of an instrument of accession to the present Charter. The present Charter shall be binding on each acceding State as of the date of deposit of its instrument of accession.

3. Any State which accedes to the present Charter shall be deemed to become thereby a principal party to the agreement between the Signatory States contained in Chapter Five and Chapter Ten of the Convention.

4. Any State acceding to the present Charter agrees to be bound by decisions of the Arbitration Tribunal pursuant to paragraph 2 of Article 9 of its Charter concerning the extent of the jurisdiction of the Commission.

CONVENTION ON THE PRESENCE OF FOREIGN FORCES
IN THE FEDERAL REPUBLIC OF GERMANY

Signed at Paris, October 23, 1954; in force May 6, 1955¹

In view of the present international situation and the need to ensure the defence of the free world which require the continuing presence of foreign forces in the Federal Republic of Germany, the United States of America, the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Federal Republic of Germany agree as follows:

ARTICLE 1

1. From the entry into force of the arrangements for the German Defence Contribution, forces of the same nationality and effective strength as at that time may be stationed in the Federal Republic.

2. The effective strength of the forces stationed in the Federal Republic pursuant to paragraph 1 of this Article may at any time be increased with the consent of the Government of the Federal Republic of Germany.

3. Additional forces of the States parties to the present Convention may enter and remain in the Federal territory with the consent of the Government of the Federal Republic of Germany for training purposes in accordance with the procedures applicable to forces assigned to the Supreme Allied Commander, Europe, provided that such forces do not remain there for more than thirty days at any one time.

¹ Sen. Execs. L and M, 83d Cong., 2d Sess. (1954), p. 89. Instruments of accession have been deposited on behalf of Belgium, Canada, Denmark, Luxembourg and The Netherlands.

4. The Federal Republic grants to the French, the United Kingdom and the United States forces the right to enter, pass through and depart from the territory of the Federal Republic in transit to or from Austria (so long as their forces continue to be stationed there) or any country Member of the North Atlantic Treaty Organization, on the same basis as is usual between Parties to the North Atlantic Treaty or as may be agreed with effect for all Member States by the North Atlantic Council.

ARTICLE 2

The present Convention shall be open to accession by any State not a Signatory, which had forces stationed in the Federal territory on the date of the signature of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany signed at Paris on 23 October 1954. Any such State, desiring to accede to the present Convention, may deposit with the Government of the Federal Republic an Instrument of Accession.

ARTICLE 3

1. The present Convention shall expire with the conclusion of a German peace settlement or if at an earlier time the Signatory States agree that the development of the international situation justifies new arrangements.

2. The Signatory States will review the terms of the present Convention at the same time and subject to the same conditions as provided for in Article 10 of the Convention on Relations between the Three Powers and the Federal Republic of Germany.

ARTICLE 4

1. The present Convention shall be ratified or approved by the Signatory States and Instruments of Ratification or Approval shall be deposited by them with the Government of the Federal Republic of Germany which shall notify each Signatory State of the deposit of each Instrument of Ratification or Approval. The present Convention shall enter into force when all the Signatory States have made such deposit and the Instrument of Accession of the Federal Republic of Germany to the North Atlantic Treaty has been deposited with the Government of the United States of America.

2. It shall also enter into force on that date as to any acceding State which has previously deposited an Instrument of Accession in accordance with Article 2 of the present Convention and, as to any other acceding State, on the date of the deposit by it of such an Instrument.

3. The present Convention shall be deposited in the Archives of the Government of the Federal Republic of Germany, which will furnish each State party to the present Convention with certified copies thereof and of the Instruments of Accession deposited in accordance with Article 2 and will notify each State of the date of the deposit of any Instrument of Accession.

IN FAITH WHEREOF the undersigned Representatives duly authorized thereto have signed the present Convention.

Done at Paris this 23rd day of October, 1954, in three texts, in the English, French and German languages, all being equally authentic.

For the United States of America:

/s/ JOHN FOSTER DULLES

For the United Kingdom of Great Britain and Northern Ireland:

/s/ ANTHONY EDEN

For the French Republic:

/s/ P. MENDES-FRANCE

For the Federal Republic of Germany:

/s/ ADENAUER

TRIPARTITE AGREEMENT ON THE EXERCISE OF RETAINED RIGHTS IN GERMANY

*Signed at Paris, October 23, 1954; in force May 5, 1955*¹

The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic agree as follows:

1. The rights retained by the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic after the entry into force of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, which are referred to in the Convention on Relations between the Three Powers and the Federal Republic of Germany as amended by the said Protocol, will be exercised by their respective Chiefs of Mission accredited to the Federal Republic of Germany.

2. The Chiefs of Mission will act jointly in the exercise of those rights in the Federal Republic of Germany in matters the Three Powers consider of common concern under the said Protocol and the instruments mentioned in Article 1 thereof.

3. Those rights which relate to Berlin will continue to be exercised in Berlin pursuant to existing procedures, subject to any future modification which may be agreed.

4. This agreement shall enter into force upon the entry into force of the said Protocol.

Done at Paris on the twenty third day of October, Nineteen hundred and fifty-four in two texts, in the English and French languages, both texts being equally authentic.

For the Government of the United States of America:

/s/ JOHN FOSTER DULLES

¹ Sen. Execs. L and M, 83d Cong., 2d Sess. (1954), p. 91.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

/s/ ANTHONY EDEN

For the Government of the French Republic:

/s/ P. MENDES-FRANCE

AGREEMENT ON THE TAX TREATMENT OF THE FORCES AND THEIR MEMBERS

*Signed at Bonn, May 26, 1952, as amended by Protocol on Termination of Occupation Regime, signed at Paris, October 23, 1954;
in force May 5, 1955¹*

THE UNITED STATES OF AMERICA,

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,

THE FRENCH REPUBLIC,

and

THE FEDERAL REPUBLIC OF GERMANY

Agree as follows:

ARTICLE 1—TAX TREATMENT OF THE FORCES

1. The Forces (which expression in this Agreement shall have the meaning given in paragraph 5 of Article 1 of the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany, hereinafter referred to as the "Forces Convention") shall be exempt from taxes which are levied in accordance with German taxation legislation in effect on the entry into force of the present Agreement, except as otherwise provided in the present Agreement.

2. Customs duties and other taxes on imports and exports of the Forces are dealt with in Article 34 of the Forces Convention; excise taxes on the purchase by the Forces of goods in the Federal Republic are dealt with in paragraph 1 and turnover tax on deliveries to, and services for, the Forces in paragraph 2 of Article 33 of that Convention.

3. Tax exemption in accordance with paragraph 1 of this Article shall not apply, to the extent that taxes are due as a result of commercial trading by the Forces in the German economy nor to property used for this purpose, nor shall it apply to the excise tax on goods manufactured by the Forces in Germany, to the tax on Bills of Exchange, or to the Transportation Tax.

4. The liability of the Forces to German taxes on the acquisition and ownership of real property shall be dealt with in a special agreement, in the event that the Forces in the future acquire real property.

¹ Sen. Doc. No. 11, 84th Cong., 1st Sess. (1955), p. 125; reprinted from Sen. Exec. C. and R., 82d Cong., 2d Sess. (1952), p. 131, and Sen. Execs. L and M, 83d Cong., 2d S. s. (1954), p. 35.

5. The treatment of the Forces in respect of taxes which may be introduced after the entry into force of the present Agreement shall be the subject of special agreements.

ARTICLE 2—TAX TREATMENT OF MEMBERS OF THE FORCES

1. Subject to the provisions of this or any other applicable agreement between the Signatory States, "members of the Forces" (which expression in this Agreement shall have the meaning given in paragraph 7 of Article 1 of the Forces Convention) shall be liable to taxes levied in accordance with existing German taxation legislation provided, however, that this provision shall not deprive a member of the Forces of any benefits which exist by reason of an intergovernmental agreement with the Federal Republic and which he could otherwise claim.

2. If, after the entry into force of the present Agreement, any law is enacted in the Federal Republic concerning new direct taxes, or levies which have the effect of direct taxes, its application to members of the Forces shall be the subject of a special agreement between the Signatory States, which shall be concluded without delay.

3. For the basis of tax liability under German law

(a) a person shall not be deemed to have acquired residence or domicile in the Federal territory by reason of his presence as a member of the Forces therein. This shall not apply in respect of the insurance tax, insofar as concerns the payment of an insurance premium to an insurer who has his normal place of business in the Federal territory. Further, the fact that no residence is established in the Federal territory shall not mean that members of the Forces are to be regarded as foreign purchasers for the purpose of the turnover tax legislation.

(b) movable property, whatever its origin, situated in the Federal territory by reason of the presence of its owner as a member of the Forces, and intended for his personal or domestic use, shall be deemed not to be situated in the Federal territory. In the case of motor vehicles, this provision shall apply only when they bear registration plates, issued by the Forces.

4. Additionally to the exemption from taxation conferred by paragraph 3 of this Article, members of the Forces shall be exempt from all German taxes and levies on payments which they receive as remuneration for their official activities with the Forces in the Federal territory. Further, they shall enjoy the taxation benefits which are granted by German taxation legislation to military personnel.

ARTICLE 3—BEER TAX

1. Beer which is procured by the Forces directly from a German manufacturer shall be exempt from excise tax. The exemption from taxation

shall apply only to purchases by the official procurement agencies of the Forces for consumption by the Forces or their members.

2. Beer which the Forces or their members bring into the Federal territory under the provisions of Articles 34 and 35 of the Forces Convention shall be exempt from excise tax.

3. Whenever the Forces procure beer, they shall certify that the beer, which is to be described exactly as to type and quantity, is intended exclusively for consumption by the Forces or their members.

ARTICLE 4—TAX TREATMENT OF ORGANIZATIONS AND ENTERPRISES SERVING THE FORCES

1. Except as may otherwise be provided in special agreements between the Signatory States, the tax exemptions contained in Articles 1 and 2 of the present Agreement shall apply to the organizations and enterprises, and their employees, referred to in Article 36 of the Forces Convention; provided, however, that they shall apply to the enterprises referred to in sub-paragraph (b) of paragraph 2 of that Article with the following exceptions:

- (a) taxation of their employees;
- (b) taxation on their income and profits;
- (c) taxation on their business property in the Federal territory.

2. The tax exemption contained in Article 3 of the present Agreement shall apply only to those organizations referred to in paragraph 1 of Article 36 of the Forces Convention whose service to the Forces includes the sale of beer to the members of the Forces.

ARTICLE 5—JURISDICTION OF ARBITRATION TRIBUNAL

All disputes arising between the Three Powers and the Federal Republic under the provisions of the present Agreement, which the parties are not able to settle by negotiations or by other means agreed between all the Signatory States, shall be subject to the jurisdiction of the Arbitration Tribunal established by Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany signed at Bonn on 26 May 1952, in the same manner and with the same effect as though the present Agreement were listed in paragraph 1 of Article 8 of that Convention as a related Convention.¹

ARTICLE 6—FINAL PROVISIONS

- 1. [Deleted.]
- 2. [Deleted.]
- 3. [Deleted.]

1. The present Agreement shall be deposited in the archives of the Government of the Federal Republic of Germany, which will furnish

Art. 5 has been inserted by a protocol, signed on July 26, 1952.

each Signatory State with certified copies thereof and notify each State of the date of the entry into force of the present Agreement.

IN FAITH WHEREOF the undersigned representatives duly authorised thereto by their respective Governments have signed the present Agreement.

Done at BONN this twenty-sixth day of May, 1952, in three texts, in the English, French and German languages, all being equally authentic.

For the United States of America:

signed: DEAN ACHESON

For the United Kingdom of Great Britain and Northern Ireland:

signed: ANTHONY EDEN

For the French Republic:

signed: ROBERT SCHUMAN

For the Federal Republic of Germany:

signed: ADENAUER

PROTOCOL TO THE NORTH ATLANTIC TREATY ON THE ACCESSION OF THE FEDERAL REPUBLIC OF GERMANY

*Signed at Paris, October 23, 1954; in force May 5, 1955*¹

The Parties to the North Atlantic Treaty signed at Washington on 4th April, 1949,

Being satisfied that the security of the North Atlantic area will be enhanced by the accession of the Federal Republic of Germany to that Treaty, and

Having noted that the Federal Republic of Germany has by a declaration dated 3rd October, 1954, accepted the obligations set forth in Article 2 of the Charter of the United Nations and has undertaken upon its accession to the North Atlantic Treaty to refrain from any action inconsistent with the strictly defensive character of that Treaty, and

Having further noted that all member governments have associated themselves with the declaration also made on 3rd October, 1954, by the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic in connection with the aforesaid declaration of the Federal Republic of Germany, Agree as follows:

ARTICLE I

Upon the entry into force of the present Protocol, the Government of the United States of America shall on behalf of all the Parties communicate to the Government of the Federal Republic of Germany an invitation to accede to the North Atlantic Treaty. Thereafter the Federal Republic of Germany shall become a Party to that Treaty on the date when it deposits its instruments of accession with the Government

¹ Sen. Execs. L. and M, 83d Cong., 2d Sess. (1954), p. 37.

of the United States of America in accordance with Article 10 of that Treaty.²

ARTICLE II

The present Protocol shall enter into force, when (a) each of the Parties to the North Atlantic Treaty has notified to the Government of the United States of America its acceptance thereof, (b) all instruments of ratification of the Protocol Modifying and Completing the Brussels Treaty have been deposited with the Belgian Government, and (c) all instruments of ratification or approval of the Convention on the Presence of Foreign Forces in the Federal Republic of Germany have been deposited with the Government of the Federal Republic of Germany. The Government of the United States of America shall inform the other Parties to the North Atlantic Treaty of the date of the receipt of each notification of acceptance of the present Protocol and of the date of the entry into force of the present Protocol.

ARTICLE III

The present Protocol, of which the English and French texts are equally authentic, shall be deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other Parties to the North Atlantic Treaty.

IN WITNESS WHEREOF, the undersigned Representatives, duly authorised thereto by their respective Governments, have signed the present Protocol.

Signed at Paris the twenty-third day of October nineteen hundred and fifty-four.

For Belgium:

P.-H. SPAAK

For Canada:

L. B. PEARSON

For Denmark:

H. C. HANSEN

For France:

P. MENDÈS-FRANCE

For Greece:

S. STEPHANOPOULOUS

For Iceland:

KRISTINN GUDMUNDSSON

For Italy:

G. MARTINO

For the Grand-Duchy of Luxembourg:

JOS. BECH

For Netherlands:

J. W. BEYEN

² Deposited May 6, 1955.

For Norway:

HALVARD LANGE

For Portugal:

PAULO CUNHA

For Turkey:

F. KÖPRÜLÜ

For the United Kingdom of Great Britain and Northern-Ireland:

ANTHONY EDEN

For the United States of America:

JOHN FOSTER DULLES

PROTOCOL NO. I MODIFYING AND COMPLETING THE BRUSSELS TREATY

*Signed at Paris, October 23, 1954; in force May 6, 1955*¹

His Majesty The King of the Belgians, the President of the French Republic, President of the French Union, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty The Queen of the Netherlands and Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Parties to the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed at Brussels on March the 17th, 1948,² hereinafter referred to as the Treaty, on the one hand,

and the President of the Federal Republic of Germany and the President of the Italian Republic on the other hand,

Inspired by a common will to strengthen peace and security;

Desirous to this end of promoting the unity and of encouraging the progressive integration of Europe;

Convinced that the accession of the Federal Republic of Germany and the Italian Republic to the Treaty will represent a new and substantial advance towards these aims;

Having taken into consideration the decisions of the London Conference as set out in the Final Act of October the 3rd, 1954, and its Annexes;

Have appointed as their Plenipotentiaries:—

His Majesty the King of the Belgians

His Excellency M. Paul-Henri Spaak, Minister of Foreign Affairs.

The President of the French Republic, President of the French Union

His Excellency M. Pierre Mendès-France, Prime Minister, Minister of Foreign Affairs.

The President of the Federal Republic of Germany

His Excellency Dr. Konrad Adenauer, Federal Chancellor, Federal Minister of Foreign Affairs.

¹ Sen. Execs. L and M, 83d Cong., 2d Sess. (1954), p. 63.

² Great Britain, Foreign Office, Misc. No. 2 (1948), Cmd. 7367; reprinted in 43 A.J.I.L. Supp. 59 (1949).

The President of the Italian Republic

His Excellency M. Gaetano Martino, Minister of Foreign Affairs

Her Royal Highness the Grand Duchess of Luxembourg

His Excellency M. Joseph Bech, Prime Minister, Minister of Foreign Affairs.

Her Majesty the Queen of the Netherlands

His Excellency M. Johan Willem Beyen, Minister of Foreign Affairs.

Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories
Head of the Commonwealth,

For the United Kingdom of Great Britain and Northern Ireland

The Right Honourable Sir Anthony Eden, K. G., M. C., Member of Parliament, Principal Secretary of State for Foreign Affairs.

Who, having exhibited their full powers found in good and due form
Have agreed as follows:—

ARTICLE I

The Federal Republic of Germany and the Italian Republic hereby accede to the Treaty as modified and completed by the present Protocol.

The High Contracting Parties to the present Protocol consider the Protocol on Forces of Western European Union (hereinafter referred to as Protocol No. II), the Protocol on the Control of Armaments and its Annexes (hereinafter referred to as Protocol No. III), and the Protocol on the Agency of Western European Union for the Control of Armaments (hereinafter referred to as Protocol No. IV) to be an integral part of the present Protocol.

ARTICLE II

The sub-paragraph of the Preamble to the Treaty: "to take such steps as may be held necessary in the event of renewal by Germany of a policy of aggression" shall be modified to read: "to promote the unity and to encourage the progressive integration of Europe."

The opening words of the 2nd paragraph of Article I shall read "The co-operation provided for in the preceding paragraph, which will be effected through the Council referred to in Article VIII. . . ."

ARTICLE III

The following new Article shall be inserted in the Treaty as Article IV:

"In the execution of the Treaty the High Contracting Parties and any organs established by Them under the Treaty shall work in close co-operation with the North Atlantic Treaty Organisation.

"Recognising the undesirability of duplicating the Military Staffs of NATO, the Council and its agency will rely on the appropriate Military Authorities of NATO for information and advice on military matters."

Articles IV, V, VI and VII of the Treaty will become respectively Articles V, VI, VII and VIII.

ARTICLE IV

Article VIII of the Treaty (formerly Article VII) shall be modified to read as follows:—

"1. For the purposes of strengthening peace and security and of promoting unity and of encouraging the progressive integration of Europe and closer co-operation between Them and with other European organisations, the High Contracting Parties to the Brussels Treaty shall create a Council to consider matters concerning the execution of this Treaty and of its Protocols and their Annexes.

"2. This Council shall be known as the "Council of Western European Union"; it shall be so organised as to be able to exercise its functions continuously; it shall set up such subsidiary bodies as may be considered necessary: in particular it shall establish immediately an Agency for the Control of Armaments whose functions are defined in Protocol No. IV.

"3. At the request of any of the High Contracting Parties the Council shall be immediately convened in order to permit Them to consult with regard to any situation which may constitute a threat to peace, in whatever area this threat should arise, or a danger to economic stability.

"4. The Council shall decide by unanimous vote questions for which no other voting procedure has been or may be agreed. In the cases provided for in Protocols II, III and IV it will follow the various voting procedures, unanimity, two-thirds majority, simple majority, laid down therein. It will decide by simple majority questions submitted to it by the Agency for the Control of Armaments."

ARTICLE V

A new Article shall be inserted in the Treaty as Article IX: "The Council of Western European Union shall make an Annual Report on its activities and in particular concerning the control of armaments to an Assembly composed of representatives of the Brussels Treaty Powers to the Consultative Assembly of the Council of Europe."

The Articles VIII, IX and X of the Treaty shall become respectively Articles X, XI and XII.

ARTICLE VI

The present Protocol and the other Protocols listed in Article I above shall be ratified and the instruments of ratification shall be deposited as soon as possible with the Belgian Government.

They shall enter into force when all instruments of ratification of the present Protocol have been deposited with the Belgian Government and the instrument of accession of the Federal Republic of Germany to the North Atlantic Treaty has been deposited with the Government of the United States of America.

The Belgian Government shall inform the Governments of the other High Contracting Parties and the Government of the United States of America of the deposit of each instrument of ratification.

IN WITNESS WHEREOF the above-mentioned Plenipotentiaries have signed the present Protocol and have affixed thereto their seals.

Done at Paris this 23rd day of October, 1954, in two texts, in the English and French languages, each text being equally authoritative in a single copy which shall remain deposited in the archives of the Belgian Government and of which certified copies shall be transmitted by that Government to each of the other Signatories.

For Belgium:

[L. s.] P.-H. SPAAK.

For France:

[L. s.] MENDES-FRANCE.

For the Federal Republic of Germany:

[L. s.] ADENAUER.

For Italy:

[L. s.] G. MARTINO.

For Luxembourg:

[L. s.] JOS. BECH.

For the Netherlands:

[L. s.] J. W. BEYEN.

For the United Kingdom of Great Britain and Northern Ireland:

[L. s.] ANTHONY EDEN.

PROTOCOL NO. II ON FORCES OF WESTERN EUROPEAN UNION

*Signed at Paris, October 23, 1954; in force May 6, 1955*¹

His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, and Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol Modifying and Completing the Brussels Treaty,

Having consulted the North Atlantic Council,

Have appointed as their Plenipotentiaries:—

¹ Sen. Execs. L and M, *op. cit. supra*, at p. 66.

His Majesty the King of the Belgians

His Excellency M. Paul-Henri Spaak, Minister of Foreign Affairs.

The President of the French Republic, President of the French Union

His Excellency M. Pierre Mendès-France, Prime Minister, Minister of Foreign Affairs.

The President of the Federal Republic of Germany

His Excellency Dr. Konrad Adenauer, Federal Chancellor, Federal Minister of Foreign Affairs.

The President of the Italian Republic

His Excellency M. Gaetano Martino, Minister of Foreign Affairs.

Her Royal Highness the Grand Duchess of Luxembourg

His Excellency M. Joseph Bech, Prime Minister, Minister of Foreign Affairs.

Her Majesty the Queen of the Netherlands

His Excellency M. Johan Willem Beyen, Minister of Foreign Affairs.

Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth,

For the United Kingdom of Great Britain and Northern Ireland

The Right Honourable Sir Anthony Eden, K. G., M.C., Member of Parliament, Principal Secretary of State for Foreign Affairs.

Have agreed as follows:—

ARTICLE 1

1. The land and air forces which each of the High Contracting Parties to the present Protocol shall place under the Supreme Allied Commander, Europe, in peace-time on the mainland of Europe shall not exceed in total strength and number of formations:

(a) for Belgium, France, the Federal Republic of Germany, Italy and the Netherlands, the maxima laid down for peace-time in the Special Agreement annexed to the Treaty on the Establishment of a European Defence Community signed at Paris, on May 27, 1952; and

(b) for the United Kingdom, four divisions and the Second Tactical Air Force;

(c) for Luxembourg, one regimental combat team.

2. The number of formations mentioned in paragraph 1 may be brought up to date and adapted as necessary to make them suitable for the North Atlantic Treaty Organisation, provided that the equivalent fighting capacity and total strengths are not exceeded.

3. The statement of these maxima does not commit any of the High Contracting Parties to build up or maintain forces at these levels, but maintains their right to do so if required.

ARTICLE 2

As regards naval forces, the contribution to N. A. T. O. Command of each of the High Contracting Parties to the present Protocol shall be determined each year in the course of the Annual Review (which takes into account the recommendations of the N. A. T. O. military authorities). The naval forces of the Federal Republic of Germany shall consist of the vessels and formations necessary for the defensive missions assigned to it by the North Atlantic Treaty Organisation within the limits laid down in the Special Agreement mentioned in Article 1, of equivalent fighting capacity.

ARTICLE 3

If at any time during the Annual Review recommendations are put forward, the effect of which would be to increase the level of forces above the limits specified in Articles 1 and 2, the acceptance by the countries concerned of such recommended increases shall be subject to the unanimous approval of the High Contracting Parties to the present Protocol expressed either in the Council of Western European Union or in the North Atlantic Treaty Organisation.

ARTICLE 4

In order that it may establish that the limits specified in Articles 1 and 2 are being observed, the Council of Western European Union will regularly receive information acquired as a result of inspections carried out by the Supreme Allied Commander, Europe. Such information will be transmitted by a high-ranking officer designated for the purpose by the Supreme Allied Commander, Europe.

ARTICLE 5

The strength and armaments of the internal defence and police forces on the mainland of Europe of the High Contracting Parties to the present Protocol shall be fixed by agreements within the Organisation of Western European Union, having regard to their proper functions and needs and to their existing levels.

ARTICLE 6

Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland will continue to maintain on the mainland of Europe, including Germany, the effective strength of the United Kingdom forces which are now assigned to the Supreme Allied Commander, Europe, that is to say, four divisions and the Second Tactical Air Force, or such other forces as the Supreme Allied Commander, Europe, regards as having equivalent fighting capacity. Her Majesty undertakes not to withdraw these forces against the wishes of the majority of the High Contracting Parties who should take their decision in the knowledge of the views of

the Supreme Allied Commander, Europe. This undertaking shall not, however, bind Her Majesty in the event of an acute overseas emergency. If the maintenance of the United Kingdom forces on the mainland of Europe throws at any time too great a strain on the external finances of the United Kingdom, Her Majesty will, through Her Government in the United Kingdom of Great Britain and Northern Ireland, invite the North Atlantic Council to review the financial conditions on which the United Kingdom formations are maintained.

IN WITNESS WHEREOF, the above-mentioned Plenipotentiaries have signed the present Protocol, being one of the Protocols listed in Article 1 of the Protocol Modifying and Completing the Treaty, and have affixed thereto their seals.

Done at Paris this 23rd day of October, 1954, in two texts in the English and French languages, each text being equally authoritative, in a single copy, which shall remain deposited in the archives of the Belgian Government and of which certified copies shall be transmitted by that Government to each of the other Signatories.

For Belgium:

[L.S.] P.-H. SPAAK.

For France:

[L.S.] MENDÈS-FRANCE.

For the Federal Republic of Germany:

[L.S.] ADENAUER.

For Italy:

[L.S.] G. MARTINO.

For Luxembourg:

[L.S.] JOS. BECH.

For the Netherlands:

[L.S.] J. W. BEYEN.

For the United Kingdom of Great Britain and Northern Ireland:

[L.S.] ANTHONY EDEN.

PROTOCOL NO. III ON THE CONTROL OF ARMAMENTS, WITH ANNEXES

*Signed at Paris, October 23, 1954; in force May 6, 1955*¹

His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol Modifying and Completing the Brussels Treaty,

¹ Sen. Execs. L and M, *op. cit. supra*, at p. 69.

Have appointed as their plenipotentiaries:—

His Majesty the King of the Belgians

His Excellency M. Paul-Henri Spaak, Minister of Foreign Affairs.

The President of the French Republic, President of the French Union

His Excellency M. Pierre Mendès-France, Prime Minister, Minister of Foreign Affairs.

The President of the Federal Republic of Germany

His Excellency Dr. Konrad Adenauer, Federal Chancellor, Federal Minister of Foreign Affairs.

The President of the Italian Republic

His Excellency M. Gaetano Martino, Minister of Foreign Affairs.

Her Royal Highness the Grand Duchess of Luxembourg

His Excellency M. Joseph Bech, Prime Minister, Minister of Foreign Affairs.

Her Majesty the Queen of the Netherlands

His Excellency M. Johan Willem Beyen, Minister of Foreign Affairs.

Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth,

For the United Kingdom of Great Britain and Northern Ireland

The Right Honourable Sir Anthony Eden, K. G., M. C., Member of Parliament, Principal Secretary of State for Foreign Affairs.

Have agreed as follows:—

PART I.—ARMAMENTS NOT TO BE MANUFACTURED

ARTICLE 1

The High Contracting Parties, members of Western European Union, take note of and record their agreement with the Declaration of the Chancellor of the Federal Republic of Germany (made in London on October 3, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook not to manufacture in its territory atomic, biological and chemical weapons. The types of armaments referred to in this Article are defined in Annex II. These armaments shall be more closely defined and the definitions brought up to date by the Council of Western European Union.

ARTICLE 2

The High Contracting Parties, members of Western European Union, also take note of and record their agreement with the undertaking given by the Chancellor of the Federal Republic of Germany in the same Declaration that certain further types of armaments will not be manufactured in the territory of the Federal Republic of Germany, except that if in accordance with the needs of the armed forces a recommendation for an amendment to, or cancellation of, the content of the list of these

armaments is made by the competent Supreme Commander of the North Atlantic Treaty Organisation, and if the Government of the Federal Republic of Germany submit a request accordingly, such an amendment or cancellation may be made by a resolution of the Council of Western European Union passed by a two-thirds majority. The types of armaments referred to in this Article are listed in Annex III.

PART II.—ARMAMENTS TO BE CONTROLLED

ARTICLE 3

When the development of atomic, biological and chemical weapons in the territory on the mainland of Europe of the High Contracting Parties who have not given up the right to produce them has passed the experimental stage and effective production of them has started there, the level of stocks that the High Contracting Parties concerned will be allowed to hold on the mainland of Europe shall be decided by a majority vote of the Council of Western European Union.

ARTICLE 4

Without prejudice to the foregoing Articles, the types of armaments listed in Annex IV will be controlled to the extent and in the manner laid down in Protocol No. IV.

ARTICLE 5

The Council of Western European Union may vary the list in Annex IV by unanimous decision.

IN WITNESS WHEREOF, the above-mentioned Plenipotentiaries have signed the present Protocol, being one of the Protocols listed in Article I of the Protocol Modifying and Completing the Treaty and have affixed thereto their seals.

Done at Paris on the 23rd day of October 1954, in two texts, in the English and French languages, each text being equally authoritative, in a single copy, which shall remain deposited in the archives of the Belgian Government and of which certified copies shall be transmitted by that Government to each of the other Signatories.

For Belgium:

[L. s.] P.-H. SPAAK.

For France:

[L. s.] MENDÈS-FRANCE.

For the Federal Republic of Germany:

[L. s.] ADENAUER.

For Italy:

[L. s.] G. MARTINO.

For Luxembourg:

[L. s.] JOS. BECH.

For the Netherlands:

[L. s.] J. W. BEYEN.

For the United Kingdom of Great Britain and Northern Ireland:
[L. S.] ANTHONY EDEN.

ANNEX I

The Federal Chancellor declares:

that the Federal Republic undertakes not to manufacture in its territory any atomic weapons, chemical weapons or biological weapons as detailed in paragraphs I, II and III of the attached list;¹

that it undertakes further not to manufacture in its territory such weapons as those detailed in paragraphs IV, V and VI of the attached list.² Any amendment to or cancellation of the substance of paragraphs IV, V and VI can, on the request of the Federal Republic be carried out by a resolution of the Brussels Council of Ministers by a two-thirds majority, if in accordance with the needs of the armed forces a request is made by the competent Supreme Commander of the North Atlantic Treaty Organisation;

that the Federal Republic agrees to supervision by the competent authority of the Brussels Treaty Organisation to ensure that these undertakings are observed.

ANNEX II

This list comprises the weapons defined in paragraphs I to III and the factories earmarked solely for their production. All apparatus, parts, equipment, installations, substances and organisms, which are used for civilian purposes or for scientific, medical and industrial research in the fields of pure and applied science shall be excluded from this definition.

I.—*Atomic Weapons*

(a) An atomic weapon is defined as any weapon which contains, or is designed to contain or utilise, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass poisoning.

(b) Furthermore, any part, device, assembly or material especially designed for, or primarily useful in, any weapon as set forth under paragraph (a), shall be deemed to be an atomic weapon.

(c) Nuclear fuel as used in the preceding definition includes plutonium Uranium 233, Uranium 235 (including Uranium 235 contained in Uranium enriched to over 2.1 per cent. by weight of Uranium 235) and any other material capable of releasing substantial quantities of atomic energy through nuclear fission or fusion or other nuclear reaction of the material. The foregoing materials shall be considered to be nuclear fuel regardless of the chemical or physical form in which they exist.

¹ Reproduced in Annex II.

² Reproduced in Annex III.

II.—*Chemical Weapons*

(a) A chemical weapon is defined as any equipment or apparatus expressly designed to use, for military purposes, the asphyxiating, toxic, irritant, paralyzant, growth-regulating, anti-lubricating or catalysing properties of any chemical substance.

(b) Subject to the provisions of paragraph (c), chemical substances, having such properties and capable of being used in the equipment or apparatus referred to in paragraph (a), shall be deemed to be included in this definition.

(c) Such apparatus and such quantities of the chemical substances as are referred to in paragraphs (a) and (b) which do not exceed peaceful civilian requirements shall be deemed to be excluded from this definition.

III.—*Biological Weapons*

(a) A biological weapon is defined as any equipment or apparatus expressly designed to use, for military purposes, harmful insects or other living or dead organisms, or their toxic products.

(b) Subject to the provisions of paragraph (c), insects, organisms and their toxic products of such nature and in such amounts as to make them capable of being used in the equipment or apparatus referred to in (a) shall be deemed to be included in this definition.

(c) Such equipment or apparatus and such quantities of the insects, organisms and their toxic products as are referred to in paragraphs (a) and (b) which do not exceed peaceful civilian requirements shall be deemed to be excluded from the definition of biological weapons.

ANNEX III

This list comprises the weapons defined in paragraphs IV to VI and the factories earmarked solely for their production. All apparatus, parts, equipment, installations, substances and organisms, which are used for civilian purposes or for scientific, medical and industrial research in the fields of pure and applied science shall be excluded from this definition.

IV.—*Long-range Missiles, Guided Missiles and Influence Mines*

(a) Subject to the provisions of paragraph (d), long-range missiles and guided missiles are defined as missiles such that the speed or direction of motion can be influenced after the instant of launching by a device or mechanism inside or outside the missile, including V-type weapons developed in the recent war and subsequent modifications thereof. Combustion is considered as a mechanism which may influence the speed.

(b) Subject to the provisions of paragraph (d), influence mines are defined as naval mines which can be exploded automatically by influences which emanate solely from external sources, including influence mines developed in the recent war and subsequent modifications thereof.

(c) Parts, devices, or assemblies specially designed for use in or with the weapons referred to in paragraphs (a) and (b) shall be deemed to be included in this definition.

(d) Proximity fuses, and short-range guided missiles for anti-aircraft defence with the following maximum characteristics are regarded as excluded from this definition:—

- Length, 2 metres;
- Diameter, 30 centimetres;
- Speed, 660 metres per second;
- Ground range, 32 kilometres;
- Weight of war-head, 22.5 kilogrammes.

V.—*Warships, with the exception of smaller ships for defence purpose.*

“Warships, with the exception of smaller ships for defence purposes are:—

- (a) Warships of more than 3,000 tons displacement;
- (b) Submarines of more than 350 tons displacement;
- (c) All warships which are driven by means other than steam Diesel or petrol engines or by gas turbines or by jet engines.”

VI.—*Bomber aircraft for strategic purposes*

ANNEX IV

LIST OF TYPES OF ARMAMENTS TO BE CONTROLLED

- 1.—(a) Atomic,
- (b) biological, and
- (c) chemical weapons.

In accordance with definitions to be approved by the Council of Western European Union as indicated in Article I of the present Protocol.

2. All guns, howitzers and mortars of any types and of any rôles of more than 90-mm. calibre, including the following component for these weapons, viz., the elevating mass.

3. All guided missiles.

Definition.—Guided missiles are such that the speed or direction or motion can be influenced after the instant of launching by a device or mechanism inside or outside the missile; these include V-type weapons developed in the recent war and modifications thereto. Combustion is considered as a mechanism which may influence the speed.

4. Other self-propelled missiles of a weight exceeding 15 kilogrammes in working order.

5. Mines of all types except anti-tank and anti-personnel mines.

6. Tanks, including the following component parts for these tanks viz:—

- (a) the elevating mass;
- (b) turret castings and/or plate assembly.

7. Other armoured fighting vehicles of an overall weight of more than 10 metric tons.

8.—(a) Warships over 1,500 tons displacement;

(b) submarines;

(c) all warships powered by means other than steam, Diesel or petrol engines or gas turbines;

(d) small craft capable of a speed of over 30 knots, equipped with offensive armament.

9. Aircraft bombs of more than 1,000 kilogrammes.

10. Ammunition for the weapons described in paragraph 2 above.

11.—(a) Complete military aircraft other than—

(i) all training aircraft except operational types used for training purposes;

(ii) military transport and communication aircraft;

(iii) helicopters;

(b) air frames, specifically and exclusively designed for military aircraft except those at (i), (ii) and (iii) above;

(c) jet engines, turbo-propeller engines and rocket motors, when these are the principal motive power.

PROTOCOL NO. IV ON THE AGENCY OF WESTERN EUROPEAN UNION FOR THE CONTROL OF ARMAMENTS

*Signed at Paris, October 23, 1954; in force May 6, 1955*¹

His Majesty the King of the Belgians, the President of the French Republic, President of the French Union, the President of the Federal Republic of Germany, the President of the Italian Republic, Her Royal Highness the Grand Duchess of Luxembourg, Her Majesty the Queen of the Netherlands, Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Head of the Commonwealth, Signatories of the Protocol Modifying and Completing the Brussels Treaty,

Having agreed in accordance with Article IV of the Protocol Modifying and Completing the Treaty, to establish an Agency for the Control of Armaments,

Have appointed as their plenipotentiaries:—

His Majesty the King of the Belgians

His Excellency M. Paul-Henri Spaak, Minister of Foreign Affairs.

The President of the French Republic, President of the French Union

His Excellency M. Pierre Mendès-France, Prime Minister, Minister of Foreign Affairs.

The President of the Federal Republic of Germany

His Excellency Dr. Konrad Adenauer, Federal Chancellor, Federal Minister of Foreign Affairs.

¹ Sen. Execs. L and M, *op. cit. supra*, at p. 75.

The President of the Italian Republic

His Excellency M. Gaetano Martino, Minister of Foreign Affairs.

Her Royal Highness the Grand Duchess of Luxembourg

His Excellency M. Joseph Bech, Prime Minister, Minister of Foreign Affairs.

Her Majesty the Queen of the Netherlands

His Excellency M. Johan Willem Beyen, Minister of Foreign Affairs.

Her Majesty The Queen of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Head of the Commonwealth,

For the United Kingdom of Great Britain and Northern Ireland
The Right Honourable Sir Anthony Eden, K. G., M. C., Member of Parliament, Principal Secretary of State for Foreign Affairs.

Have agreed as follows:—

PART I.—CONSTITUTION

ARTICLE 1

The Agency for the Control of Armaments (hereinafter referred to as "the Agency") shall be responsible to the Council of Western European Union (hereinafter referred to as "the Council"). It shall consist of a Director assisted by a Deputy Director, and supported by a staff drawn equitably from nationals of the High Contracting Parties, Members of Western European Union.

ARTICLE 2

The Director and his staff, including any officials who may be put at the disposal of the Agency by States Members, shall be subject to the general administrative control of the Secretary-General of Western European Union.

ARTICLE 3

The Director shall be appointed by unanimous decision of the Council for a period of five years and shall not be eligible for reappointment. He shall be responsible for the selection of his staff in accordance with the principle mentioned in Article 1 and in consultation with the individual States Members concerned. Before filling the posts of Deputy Director and of the Heads of Departments of the Agency, the Director shall obtain from the Council approval of the persons to be appointed.

ARTICLE 4

1. The Director shall submit to the Council, through the Secretary-General, a plan for the organisation of the Agency. The organisation should provide for departments dealing respectively with—

- (a) the examination of statistical and budgetary information to be obtained from the members of Western European Union and from the appropriate N. A. T. O. authorities;
- (b) inspections, test checks and visits;
- (c) administration.

2. The organisation may be modified by decision of the Council.

ARTICLE 5

The costs of maintaining the Agency shall appear in the budget of Western European Union. The Director shall submit, through the Secretary-General, to the Council an annual estimate of these costs.

ARTICLE 6

Officials of the Agency shall be bound by the full N. A. T. O. code of security. They shall in no circumstances reveal information obtained in connexion with the execution of their official tasks except and only in the performance of their duties towards the Agency.

PART II.—FUNCTIONS

ARTICLE 7

1. The tasks of the Agency shall be—

(a) to satisfy itself that the undertakings set out in Protocol No. III not to manufacture certain types of armaments mentioned in Annexes II and III to that Protocol are being observed;

(b) to control, in accordance with Part III of the present Protocol, the level of stocks of armaments of the types mentioned in Annex IV to Protocol No. III held by each member of Western European Union on the mainland of Europe. This control shall extend to production and imports to the extent required to make the control of stocks effective.

2. For the purposes mentioned in paragraph 1 of this Article, the Agency shall—

(a) scrutinize statistical and budgetary information supplied by members of Western European Union and by the N. A. T. O. authorities;

(b) undertake on the mainland of Europe test checks, visits and inspections at production plants, depots and forces (other than depots or forces under N. A. T. O. authority);

(c) report to the Council.

ARTICLE 8

With respect to forces and depots under N. A. T. O. authority, test checks, visits and inspections shall be undertaken by the appropriate authorities of the North Atlantic Treaty Organisation. In the case of

the forces and depots under the Supreme Allied Commander, Europe, the Agency shall receive notification of the information supplied to the Council through the medium of the high-ranking officer to be designated by him.

ARTICLE 9

The operations of the Agency shall be confined to the mainland of Europe.

ARTICLE 10

The Agency shall direct its attention to the production of end-items and components listed in Annexes II, III and IV of Protocol No. III, and not to processes. It shall ensure that materials and products destined for civilian use are excluded from its operations.

ARTICLE 11

Inspections by the Agency shall not be of a routine character, but shall be in the nature of tests carried out at regular intervals. Such inspections shall be conducted in a spirit of harmony and co-operation. The Director shall propose to the Council detailed regulations for the conduct of the inspections providing, *inter alia*, for due process of law in respect of private interests.

ARTICLE 12

For their test checks, visits and inspections the members of the Agency shall be accorded free access on demand to plants and depots, and the relevant accounts and documents shall be made available to them. The Agency and national authorities shall co-operate in such checks and inspections, and in particular national authorities may, at their own request, take part in them.

PART III.—LEVELS OF STOCKS OF ARMAMENTS

ARTICLE 13

1. Each member of Western European Union shall, in respect of its forces under N. A. T. O. authority stationed on the mainland of Europe furnish annually to the Agency statements of:—

- (a) the total quantities of armaments of the types mentioned in Annex IV to Protocol No. III required in relation to its forces
- (b) the quantities of such armaments currently held at the beginning of the control years;
- (c) the programmes for attaining the total quantities mentioned in (a) by:—
 - (i) manufacture in its own territory;
 - (ii) purchase from another country;
 - (iii) end-item aid from another country.

2. Such statements shall also be furnished by each member of Western European Union in respect of its internal defence and police forces and its other forces under national control stationed on the mainland of Europe including a statement of stocks held there for its forces stationed overseas.

3. The statements shall be correlated with the relevant submissions to the North Atlantic Treaty Organisation.

ARTICLE 14

As regards the forces under N. A. T. O. authority, the Agency shall verify in consultation with the appropriate N. A. T. O. authorities that the total quantities stated under Article 13 are consistent with the quantities recognised as required by the units of the members concerned under N. A. T. O. authority, and with the conclusions and data recorded in the documents approved by the North Atlantic Council in connexion with the N. A. T. O. Annual Review.

ARTICLE 15

As regards internal defence and police forces, the total quantities of their armaments to be accepted as appropriate by the Agency shall be those notified by the members, provided that they remain within the limits laid down in the further agreements to be concluded by the members of Western European Union on the strength and armaments of the internal defence and police forces on the mainland of Europe.

ARTICLE 16

As regards other forces remaining under national control, the total quantities of their armaments to be accepted as appropriate by the Agency shall be those notified to the Agency by the members.

ARTICLE 17

The figures furnished by members for the total quantities of armaments under Articles 15 and 16 shall correspond to the size and mission of the forces concerned.

ARTICLE 18

The provisions of Articles 14 and 17 shall not apply to the High Contracting Parties and to the categories of weapons covered in Article 3 of Protocol No. III. Stocks of the weapons in question shall be determined in conformity with the procedure laid down in that Article and shall be notified to the Agency by the Council of the Western European Union.

ARTICLE 19

The figures obtained by the Agency under Articles 14, 15, 16 and 17 shall be reported to the Council as appropriate levels for the current control year for the members of Western European Union. Any discrepancies between the figures stated under Article 13, paragraph 1, and the quantities recognised under Article 14 will also be reported.

ARTICLE 20

1. The Agency shall immediately report to the Council if inspection, or information from other sources, reveals:—

(a) the manufacture of armaments of a type which the member concerned has undertaken not to manufacture;

(b) the existence of stocks of armaments in excess of the figure and quantities ascertained in accordance with Articles 19 and 22.

2. If the Council is satisfied that the infraction reported by the Agency is not of major importance and can be remedied by prompt local action it will so inform the Agency and the member concerned, who will take the necessary steps.

3. In the case of other infractions, the Council will invite the member concerned to provide the necessary explanation within a period to be determined by the Council; if this explanation is considered unsatisfactory, the Council will take the measures which it deems necessary in accordance with a procedure to be determined.

4. Decisions of the Council under this Article will be taken by majority vote.

ARTICLE 21

Each member shall notify to the Agency the names and locations of the depots on the mainland of Europe containing armaments subject to control and of the plants on the mainland of Europe manufacturing such armaments, or, even though not in operation, specifically intended for the manufacture of such armaments.

ARTICLE 22

Each member of Western European Union shall keep the Agency informed of the quantities of armaments of the types mentioned in Annex IV to Protocol No. III, which are to be exported from its territory on the mainland of Europe. The Agency shall be entitled to satisfy itself that the armaments concerned are in fact exported. If the level of stocks of any item subject to control appears abnormal, the Agency shall further be entitled to enquire into the orders for export.

ARTICLE 23

The Council shall transmit to the Agency information received from the Governments of the United States of America and Canada respecting military aid to be furnished to the forces on the mainland of Europe of members of Western European Union.

IN WITNESS WHEREOF, the above-mentioned Plenipotentiaries have signed the present Protocol, being one of the Protocols listed in Article I of the Protocol Modifying and Completing the Treaty, and have affixed thereto their seals.

Done at Paris this 23rd day of October, 1954, in two texts, in the English and French languages, each text being equally authoritative, in a single copy, which shall remain deposited in the archives of the Belgian Government and of which certified copies shall be transmitted by that Government to each of the other Signatories.

For Belgium:

[L. s.] P.-H. SPAAK.

For France:

[L. s.] MENDÈS-FRANCE.

For the Federal Republic of Germany:

[L. s.] ADENAUER.

For Italy:

[L. s.] G. MARTINO.

For Luxembourg:

[L. s.] JOS. BECH.

For the Netherlands:

[L. s.] J. W. BEYEN.

For the United Kingdom of Great Britain and Northern Ireland:

[L. s.] ANTHONY EDEN.

ALLIED HIGH COMMISSION

PROCLAMATION ¹

WHEREAS a new relationship between the French Republic, the United States of America, and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Federal Republic of Germany, on the other, has been established by the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Related Conventions which were signed at Bonn on 26 May 1952,² were amended by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany signed at Paris on 23 October 1954,³ and enter into force today,

NOW THEREFORE, WE,

André François-Poncet, French High Commissioner for Germany,

¹ HICOG Press Release May 5, 1955; 32 Dept. of State Bulletin 791 (May 16, 1955).

² Sen. Execs. Q and R, 82d Cong., 2d Sess. See *supra*, p. 57 *et seq.*

³ Sen. Execs. L and M, 83d Cong., 2d Sess.; *supra*, p. 55.

James B. Conant, United States High Commissioner for Germany,
Frederick Robert Hoyer Millar, United Kingdom High Commissioner
for Germany,

Acting on behalf of, and duly authorized by, our Governments,

DO HEREBY JOINTLY PROCLAIM:

THAT the Occupation Statute⁴ is revoked; and

THAT the Allied High Commission and the Offices of the Land Commissioners in the Federal Republic are abolished.

This Proclamation shall take effect at noon on the fifth day of May 1955.

Done at BONN, Mehlem, this 5th day of May 1955.

A. FRANÇOIS-PONCET

JAMES B. CONANT

F. R. HOYER MILLAR

UNITED STATES

EXECUTIVE ORDER No. 10608¹

UNITED STATES AUTHORITY AND FUNCTIONS IN GERMANY

By virtue of the authority vested in me by the Constitution and the statutes, including the Foreign Service Act of 1946 (60 Stat. 999), as amended, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered as follows:

1. Executive Order No. 10062 of June 6, 1949, and Executive Order No. 10144 of July 21, 1950, amending that order, are hereby revoked, and the position of United States High Commissioner for Germany, established by that order, is hereby abolished.

2. The chief of the United States Diplomatic Mission to the Federal Republic of Germany, hereinafter referred to as the Chief of Mission, shall have supreme authority, except as otherwise provided herein, with respect to all responsibilities, duties, and governmental functions of the United States in all Germany. The Chief of Mission shall exercise his authority under the supervision of the Secretary of State and subject to ultimate direction by the President.

3. The United States Military Commander having area responsibility in Germany, hereinafter referred to as the Commander, shall have authority with respect to all military responsibilities, duties, and functions of the United States in all Germany, including the command, security, and stationing of United States forces in Germany, the assertion and exercise of their rights and discharge of their obligations therein, and emergency measures which he may consider essential for their protection or the accomplishment of his mission. The Commander may delegate the authority conferred upon him. If action by the Commander or any representative of the Commander, pursuant to the authority herein conferred, affects the foreign policy of the United States or involves relations or negotiations

⁴ 20 Dept. of State Bulletin 500 (1949); 43 A.J.I.L. Supp. 172 (1949).

¹ 20 Fed. Reg. 3093; 32 Dept. of State Bulletin 792 (May 16, 1955).

with non-military German authorities, such action shall be taken only after consultation with and agreement by the Chief of Mission or pursuant to procedures previously agreed to between the Chief of Mission and the Commander or his representative. Either the Chief of Mission or the Commander may raise with the other any question which he believes requires such consultation. If agreement is not reached between them, any differences may be referred to the Department of State and the Department of Defense for resolution.

4. The Chief of Mission and the Commander or his designated representatives shall, to the fullest extent consistent with their respective missions, render assistance and support to each other in carrying out the agreements and policies of the United States.

5. With regard to the custody, care, and execution of sentences and disposition (including pardon, clemency, parole, or release) of war criminals confined or hereafter to be confined in Germany as a result of conviction by military tribunals (A) the Chief of Mission shall share the four-power responsibility in the case of persons convicted by the International Military Tribunal, (B) the Chief of Mission shall exercise responsibility in the case of persons convicted by military tribunals established by the United States Military Governor pursuant to Control Council Law No. 10, and (C) the Commander shall exercise responsibility in the case of persons convicted by other military tribunals established by United States Military Commanders in Germany and elsewhere. The Commander shall, on request of the Chief of Mission, take necessary measures for carrying into execution any sentences adjudged against such persons in category (B) as to whom the Chief of Mission has responsibility and control. Transfer of custody of persons in categories (B) and (C) to the Federal Republic of Germany as provided in the Convention on the Settlement of Matters Arising out of the War and Occupation² shall terminate the responsibility of the Chief of Mission and the Commander with respect to such persons to the extent that the responsibility of the United States for them is thereupon terminated pursuant to the provisions of the said Convention.

6. If major differences arise over matters affecting the United States Forces in Germany, such differences may be referred to the Department of State and the Department of Defense for resolution.

7. This order shall become effective on the date that the Convention on Relations between the Three Powers and the Federal Republic of Germany and related Conventions, as amended, come into force.

[Signed] DWIGHT D. EISENHOWER

THE WHITE HOUSE,

May 5, 1955.

² See *supra*, p. 74.

AMERICAN JOURNAL OF INTERNATIONAL LAW

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CONTENTS

RELATION OF INTERNATIONAL LAW TO INTERNAL LAW IN AUSTRIA. <i>Ignaz Seidl-Hohenveldern</i>	151
COMPENSATION FOR NATIONALIZED PROPERTY: BRITISH PRACTICE. <i>Alfred Drachler</i>	167
THE SUEZ CANAL BASE AGREEMENT OF 1954. <i>Charles B. Selak, Jr.</i>	187
AMERICAN CONSULAR JURISDICTION IN MOROCCO AND THE TANGIER INTERNATIONAL JURISDICTION. <i>Kurt H. Nadelmann</i>	200
THE SOVIET INTERPRETATION OF INTERNATIONAL LAW. <i>W. W. Kulski</i>	318
SYMPOSIUM COMMENT:	
The State Treaty with Austria. <i>Josef L. Kunz</i>	335
The Cold War? <i>Pitman B. Potter</i>	342
The Treaty of 1955 between the United States and Panama. <i>G. G. Fenwick</i>	343
NOTES AND COMMENTS:	
Frederic René Coudert—1871–1955. <i>George A. Finch</i>	548
The Geneva Conventions of 1949 before the United States Senate. <i>R. R. Bort</i>	550
Immunity from Taxation of Real Property Owned by Delegations to the United Nations. <i>Robert Delson</i>	553
Attempts to Transmute Indemnity into Discharge of Claims in Executive Agreements. <i>Michael H. Cardozo</i>	560
Organization of Central America States: Election of Secretary General. <i>G. G. Fenwick</i>	563
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>Oliver J. Lissitzyn</i>	625
BOOK REVIEWS AND NOTES:	
<i>British Year Book of International Law</i> , 1953, 587; <i>Starke, An Introduction to International Law</i> (3rd ed.), 588; <i>Lapenna, Conceptions Sovétiques de Droit International Public</i> , 589; <i>De Muralt, The Problem of State Succession with regard to Treaties</i> , 590; <i>Nikolayev, Problema Territorialnykh Vopr. i Mezh. i Vnesh. Prava</i> , 592; <i>García Sayán, Notas sobre la Soberanía Marítima de Perú</i> , 593; <i>Drion, Limitation of Liabilities in International Air Law</i> , 594; <i>Wright, The Study of International Relations</i> , 595; <i>Wright, Contemporary International Law</i> , 595; <i>Laws Concerning Nationality</i> , 597; <i>Blumenkron, La Doctrina del Reconocimiento en la Teoría y en la Práctica de los Estados</i> , 598; <i>European Yearbook</i> , Vol. 1, 598; <i>Political Handbook of the World</i> , 1955, 599; <i>Study Group, The Political Economy of American Foreign Policy</i> , 599; <i>Mason, Promoting Economic Development</i> , 601; <i>Poplai (ed.), Asia and Africa in the Modern World</i> , 601; <i>Van Der Veen, Aiding Underdeveloped Countries through International Economic Cooperation</i> , 601.	
Books Received	612
BIBLIOGRAPHICAL LITERATURE OF INTERNATIONAL LAW	614
INDEX	618
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

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RELATION OF INTERNATIONAL LAW TO INTERNAL LAW IN AUSTRIA

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The rules concerning the relation of international law to internal law in Austria have undergone less change than those of many other European countries since the end of World War I. The relevant provisions¹ of the Austrian Federal Constitution of October 1, 1920,² were not affected by the subsequent constitutional reforms.³ These rules had been the subject of much theoretical discussion⁴ before a sizable body of constitutional usage and relevant jurisprudence had developed. The present article aims at examining and supplementing these theories in the light of current practice.

I. THE GENERALLY RECOGNIZED RULES OF INTERNATIONAL LAW

Article 9 of the Federal Constitution reads: "The generally recognized rules of international law are valid as integral parts of Austrian Federal

¹ English text in U.N. Legislative Series, Laws and Practices Concerning the Conclusion of Treaties, ST/LEG/SER. B/3, pp. 7 ff.

² Bundesgesetzblatt (Federal Gazette, hereafter referred to as BGBl.), No. 1/1920. Mary Macdonald, *The Republic of Austria 1918-1934* (London, 1946), pp. 107-155, contains an English translation of this Constitution.

³ BGBl. No. 268/1925, Consolidated Text BGBl. No. 367/1925, and BGBl. No. 392/1929, Consolidated Text BGBl. No. 1/1930. Constitutional Law of May 1, 1945, Staatsgesetzblatt (hereafter referred to as StGBL.) No. 4/1945, and Constitutional Law of Dec. 13, 1945, StGBL. No. 232/1945. The Federal Constitution of May 1, 1934, BGBl. No. 17/1934, II (effective 1934-1938), reproduced these provisions without major alterations.

⁴ Ludwig Adamovich, *Grundriss des österreichischen Verfassungsrechtes* (1947); Josef Hlavač, "Zur innerstaatlichen Verbindlichkeit internationaler Arbeitsübereinkommen," *Das Recht der Arbeit*, August, 1952, pp. 19-23; Ludwig Jordan, "Bemerkungen zu Art. 9 der österreichischen Bundesverfassung," 7 *Zeitschrift für öffentliches Recht* 453-459 (1928); Hans Kelsen, *Die Verfassungsgesetze der Republik Österreich*, Vol. V: *Die Bundesverfassung vom 1. Oktober 1920*, pp. 53-284; Josef Kunz, "Völkerrechtliche Bemerkungen zur österreichischen Bundesverfassung," 54-55 *Annalen des Deutschen Reichs* 295-324 (1921/22); Rudolf A. Métall, "Das allgemeine Völkerrecht und das innerstaatliche Verfassungsrecht, Zur Auslegung des Art. 9 der österreichischen Bundesverfassung," 14 *Zeitschrift für Völkerrecht* 161-187 (1927); "Die gerichtliche Überprüfung von Staatsverträgen nach der österreichischen Bundesverfassung," 7 *Zeitschrift für öffentliches Recht* 106-118 (1928); and "Zur Auslegung des Art. 50 der Bundesverfassung," *Österreichisches Verwaltungsblatt* 1930, No. 20, p. 3; Alfred Verdross, "Welche Bedeutung haben zwischenstaatliche Verträge für die innerstaatliche Gesetzgebung," *Verhandlungsschrift des 2. deutschen Juristentages in der CSR, Brünn, 1925*, p. 235; and "Le fondement du droit international," 16 *Recueil des Cours, Académie de Droit International* 273 (1927, I); and *Völkerrecht* (ed. 1955) 65-69.

Law." This rule was embodied in the Austrian Constitution so as to correspond to Article 4 of the Weimar Constitution.⁵ Whereas the latter measure was adopted only after long debates,⁶ there was no official comment⁷ on the draft of Article 9, which was passed without being discussed.⁸ The meaning of this rule has, however, been clarified by some decisions.

A rule of international law does not have to be recognized unanimously by all states in order to be considered a "generally recognized rule of international law" under Article 9 of the Constitution. The Austrian Supreme Court held⁹ the Hague Rules of Land Warfare to be part of Austrian Federal law, not by virtue of the ratification of the Hague Conventions of 1899 and 1907 by the Austro-Hungarian Monarchy,¹⁰ but by virtue of Article 9 of the Austrian Constitution.¹¹

In one of these cases a mail coach, which had originally belonged to the German Reichspost, had been taken as war booty by the Red Army, which first loaned it to the Austrian postal authorities, but subsequently sold it to a private Austrian citizen. The postal authorities refused to hand over the coach, contesting the Red Army's right to take war booty under Article 53, subparagraph 1 of the Hague Rules of Land Warfare, as the Soviet Union had not adhered to these rules.¹² The Supreme Court deemed it

unnecessary to inquire, whether the Red Army did recognize the principles embodied in the Hague Rules as customary law even if the USSR should not have adhered to these rules. In the present dispute between Austrian parties, the one decisive element was the

⁵ Kelsen, 5 *op. cit.* 75.

⁶ Lawrence Preuss, "International Law in the Constitutions of the Länder in the American Zone of Germany," 41 A.J.I.L. 888-889 (1947); Verdross, *Die Einheit des rechtlichen Weltbildes*, 111-114, gives a summary of these debates. Due to a comment by Prof. Verdross, the wording of this article, as adopted by the Constitutional Committee, was changed. While the draft of the Committee declared that the generally recognized rules of international law should regulate merely the foreign relations of Germany, the wording finally adopted conforms to the theory propounded by Prof. Verdross that these rules should also be binding as internal law. See note 31 *infra*.

⁷ Annex No. 991 to the Stenographic Records of the Constituent National Assembly, reprinted by Kelsen, *op. cit.* 507-520.

⁸ Métall, 14 *Zeitschrift für Völkerrecht* 161-162 (1927); Kunz, *loc. cit.* 309.

⁹ Nov. 24, 1950; Seidl-Hohenveldern, "Settlement of Claims for Damages arising out of the Occupation of Austria," 79 *Journal du Droit International* 565 (1952), note 11; Oct. 1, 1947, *Österreichische Juristen-Zeitung*, Reports, No. 790/1947.

¹⁰ Austrian Reichsgesetzblatt (hereafter referred to as RGBl.) No. 174/1913, and No. 180/1913.

¹¹ The Court refused to recognize this ratification as binding, since the Austrian Republic is a different state from the Austro-Hungarian Monarchy. The Court, however, failed to take notice of an official announcement in the *Bundesgesetzblatt* No. 381/1937, that in 1937 Austria had declared, in the forms required by international law and by the 1934 Constitution, its willingness to recognize the Hague Conventions as binding for Austria.

¹² On this controversial issue see B. Meissner, *Sowjetunion und Haager Landkriegsordnung*, Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg (1950).

fact that Austria had accepted the provisions of the Hague Rules as generally recognized rules of international law.¹³

Thus, the fact that it was at least doubtful whether a major Power like the Soviet Union adhered to these rules did not prevent the Court from considering them to be generally recognized. The stress which the Court laid on the fact that Austria had accepted the rules concerned, should not be interpreted in the sense that this fact, rather than the unanimous consent of states, should be the decisive test¹⁴ as to whether a rule is generally recognized¹⁵ in the eyes of Austrian courts.

In the *Dralle* case¹⁶ the rule followed by the vast majority of earlier Austrian Supreme Court decisions,¹⁷ that a foreign state is immune from Austrian jurisdiction in respect of its *acta jure gestionis* as well as of its *acta jure imperii*, was abandoned by the Supreme Court when it found, after an exhaustive survey of the views held in other countries, that this rule was no longer "generally recognized." The *Dralle* decision explicitly intends to establish a new rule¹⁸ "valid under the circumstances prevailing today," in contrast to prior decisions. Thus, the notion of "generally recognized rules" in the Austrian Federal Constitution is not to be construed as referring to the rules generally recognized at the time of the adoption of the Constitution, although in general the words of the Constitution are interpreted according to their historic meaning.¹⁹ Old rules may, however, be abandoned and new rules introduced under this clause.²⁰

The principles contained in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, have not yet been held to be such generally recognized rules. The Constitutional Court refused to apply them, "as this Resolution of the United Nations had not yet been incorporated in the internal law of

¹³ Decision of Oct. 1, 1947, *Österr. Juristen-Zeitung*, Reports, No. 790/1947.

¹⁴ Paul Heilbronn, *Grundbegriffe des Völkerrechtes* 33 (1912), quoted by Kunz, *loc. cit.* 311, holds that a rule not accepted by the state concerned could never bind this state. See also the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*, Judgment of Dec. 18, 1951, [1951] *I.C.J. Reports* 131.

¹⁵ Kelsen, 5 *op. cit.* 75-76, maintains that Art. 9 would be superfluous, if it would merely imply that the rules already recognized by Austria should be recognized as Austrian law; *contra*, Jordan, *loc. cit.* 454-455, and Métall, 14 *Zeitschrift für Völkerrecht* 169 (1927).

¹⁶ *Hoffmann v. Dralle*, May 10, 1950, Supreme Court, Off. Coll. SZ XXIII (1950) No. 143; 45 *A.J.I.L.* 354 (1951); 77 *Journal du Droit International* 748 (1950); *Österreichische Juristen Zeitung*, Reports, No. 356/1950.

¹⁷ Seven decisions prior to 1900, decisions of Jan. 20, 1926, Sept. 11, 1928 (*Annual Digest* (1927-28), Case No. 113, p. 178), June 4, 1930, Jan. 22, 1935, Sept. 17, 1947; *contra*, Dec. 17, 1907, Feb. 5, 1918, Aug. 27, 1919, Jan. 5, 1920 (*Annual Digest* (1919-1922), Case No. 79, p. 113), all quoted in *Hoffmann v. Dralle*.

¹⁸ Austria has, however, not actively opposed the formation of this new rule. It is situations like this to which the authorities quoted (note 14 *supra*) appear to refer.

¹⁹ Const. Court, Oct. 5, 1951, Off. Coll. No. 2192.

²⁰ In this sense, Verdross, 16 *Hague Academy Recueil* 273 (1927, I); Kunz, *loc. cit.* 319.

Austria, all the more so, as the Republic of Austria has not yet become a member of the United Nations."²¹

The reference of Article 9 to the "recognized rules of international law" is extensively construed as comprising also the generally recognized rules of private international law and of international administrative law.²²

The fact that the provision concerning the incorporation of the generally recognized rules of international law into Austrian law is embodied in the Federal Constitution does not put these rules on the same level as the Constitution; hence a Federal law may depart from these rules without having to be adopted with the qualified majority²³ required for "Constitutional Laws," *i.e.*, laws amending the Constitution.²⁴ The Constitutional Court has frequently held that Article 9 does not bestow any subjective right guaranteed by the Constitution on the individual citizen.²⁵ Therefore, a person cannot base a claim before the Constitutional Court on an alleged violation of international law in the same manner as in the case of an alleged violation of his civil rights.²⁶ The Supreme Court likewise seems to envisage the possibility that laws may derogate from the generally recognized rules of international law.²⁷ These rules would acquire a status of permanence equal to that of constitutional laws only if Article 145 of the Constitution should become operative.²⁸

The reason why Article 9 figures in the Federal Constitution is that it establishes a rule concerning the delimitation of Federal and *Land* rights in these matters by declaring them to be Federal matters.²⁹ It therefore was by Federal law that a principle forming part of the generally recognized rules of international law was expressly restated in an Austrian law. Under Paragraph 1 of the Federal law of July 30, 1925 (BGBl. No. 288), persons who, according to the principles of international tax law, are immune from taxation shall also be immune from *Länder* taxes, even if the taxation law of the *Land* concerned contains no provisions to this effect.³⁰

Moreover, Article 9 effects the transformation of the "generally recognized rules" into internal law. They thereby become binding not only

²¹ Const. Court, Oct. 5, 1950, Off. Coll. No. 2030, U.N. Yearbook on Human Rights for 1950, p. 28. In "Die Allgemeine Deklaration der Menschenrechte als Rechtsquelle," Juristische Blätter, 1952, pp. 558-559, this writer points out that the Declaration is not legally binding even for Members of the United Nations.

²² Métall, 14 Zeitschrift für Völkerrecht 172 (1927), and the decisions of the Supreme Court of July 9, 1948, Off. Coll. SZ XXI, No. 114, and of May 31, 1951, 1 Am. J. Comp. Law 122 (1952), denying extraterritorial effects to foreign confiscatory decrees.

²³ Constitutional laws shall be adopted in the *Nationalrat* by a majority of two-thirds of the votes recorded, at least half of its members being present (Art. 44 (1)).

²⁴ *Contra* Métall, 14 Zeitschrift für Völkerrecht 177 (1927); and Kunz, *loc. cit.* 320. In its decision of June 24, 1954, Off. Coll. No. 2680, the Constitutional Court explicitly held that these rules rank equally with ordinary laws but not with constitutional laws. For excerpts of decision and comments thereon, see Knoll, *Recht der Internationalen Wirtschaft* 48 (1954).

²⁵ Cases cited, note 9 *supra* and note 80 *infra*.

²⁶ Const. Court, Jan. 10, 1931, Off. Coll. No. 1375.

²⁷ See case cited, note 38 *infra*.

²⁸ See *infra*, p. 475.

²⁹ Const. Court, Jan. 10, 1931, Off. Coll. No. 1375.

³⁰ Jordan, *loc. cit.* 457.

for the Austrian Administration but also for all Austrian citizens and for all foreigners residing in Austria.³¹ The co-ordination of these rules with Austrian internal law is likewise important in view of Article 18 (1). Under this provision, the entire Administration shall be conducted only upon the basis of "laws." Without Article 9 there would be no possibility of administrative action on the strength of generally recognized rules of international law not embodied in laws or treaties.³²

The generally recognized rules of international law transformed into internal law under Article 9 have to give way before contrary provisions in laws or treaties transformed into internal law under Articles 49 and 50 of the Constitution.³³ The Constitutional Court did not contradict a plea that pending the coming into force of a treaty a generally recognized rule of international law obliges a state to refrain from acts which would be contrary to the treaty once it becomes effective.³⁴ Yet the court ruled that it could not apply the treaty concerned before it had come into force, even in order to prevent such acts,³⁵ where such application would have been contrary to existing legislation. On the other hand, provisions in laws and treaties which concern a matter where there exist generally recognized rules of international law, have to be construed as embodying these rules, although they do not contain any explicit reference to these rules. Thus, Austria applies as a generally recognized rule of international law the rule that a person may be extradited only for acts which constitute a criminal act under the law of the extraditing country as well as under the law of the country asking for extradition. Yet this rule does not figure in the Austrian legal provisions concerning extradition.³⁶ In a recent case concerning extradition to Germany, the Supreme Court stated *obiter* that this rule applied especially in the case concerned, as the Austrian law concerning extradition to Germany³⁷ contains no provision to the contrary. The Supreme Court thereby showed that it shared the view that generally recognized rules of international law could be superseded by express contrary provisions in subsequent treaties.³⁸ In the same way, the Supreme Court refused to enter a lien (as a mortgage) on an embassy building, thus frustrating the enforcement of a title against a foreign embassy in Vienna resulting from a judgment of an Austrian court.³⁹ Yet the

³¹ Supreme Court, May 31, 1950 (Österr. Juristen-Zeitung, Reports, No. 343/1950). This decision correctly describes the effects of Art. 9, but it errs in assuming that the Agreement of June 28, 1946, on the Machinery of Control in Austria (U.K. Treaty Series No. 49 (1946), Cmd. 6558) does contain such rules.

³² Jordan, *loc. cit.* 456.

³³ *Ibid.*, 455, *contra* Métall, 14 Zeitschrift für Völkerrecht 181 (1927).

³⁴ P.C.I.J., May 25, 1926, Case concerning certain German Interests in Polish Upper Silesia (The Merits) Series A, No. 7, pp. 29, 37.

³⁵ Decision of March 28, 1952, Off. Coll. No. 2311. This case is more amply discussed *infra*, p. 464.

³⁶ Par. 59, Strafprozessordnung, RGBI. No. 119/1873, as amended.

³⁷ Notice of the Federal Ministry of Justice of Aug. 4, 1930, Amtsblatt der Justizverwaltung, 1930, No. 20.

³⁸ Supreme Court, March 20, 1953 (Österr. Juristen-Zeitung, Reports, No. 380/1953).

³⁹ Decision of March 15, 1921, Off. Coll. SZ III, No. 32 (Annual Digest (1919-1922), Case No. 208, p. 291).

Austrian rules on the enforcement of judgments (*Exekutionsordnung*, RGBl. No. 79/1896 as amended) do not enumerate foreign embassy buildings among the objects exempt from enforcement measures. The court reached this decision by referring to Article IX of the Introductory Law to the Rules of Jurisdiction.⁴⁰ Under this rule persons⁴¹ who enjoy extritoriality according to the principles of international law are exempt from Austrian jurisdiction. In cases of doubt, the courts shall ask the Federal Ministry of Justice whether a certain person does or does not enjoy extritoriality according to these principles. A statement to such effect is binding on the courts under Article IX of the above-mentioned law.⁴² Thus, in these cases, the final decision as to what principles of international law are recognized by Austria rests with the Administration and not with the courts. However, in cases where the courts are not bound by such special rules they apply the generally recognized rules of international law without seeking the Administration's guidance.⁴³

II. INTERNATIONAL AGREEMENTS

A. TRANSFORMATION INTO INTERNAL LAW

1. *Distribution of the Treaty-Making Power*

(a) Types of International Agreements

In Austria the treaty-making power is in principle vested in the Federal President. His treaty-making power is, however, limited by measures submitting it to parliamentary control; moreover, for reasons of expediency, the Constitution authorizes him to delegate parts of his treaty-making power to the Federal Executive. The *Länder* possess no treaty-making power.⁴⁴

International agreements may thus be concluded in Austria according to the following procedures: Political treaties and treaties involving changes in ordinary laws are valid only if approved by the *Nationalrat* by a simple majority vote (Article 50 (1) of the Constitution.)⁴⁵ Treaties involving a change in provisions of constitutional laws are valid only if the *Nationalrat* has approved them, observing the procedures required for constitutional amendments (Article 50 (2)).⁴⁶

⁴⁰ Einführungsgesetz zur Jurisdiktionsnorm, RGBl. No. 110/1895, as amended.

⁴¹ The court interpreted "persons" as meaning physical as well as juridical persons.

⁴² To the same effect, par. 2 of the Federal law of June 30, 1948, BGBl. No. 155, on the privileges and immunities of international organizations and of their officials. Karl Satter, "Bestimmung der Grenzen für die inländische Gerichtsbarkeit durch Verwaltungsakte," *Juristische Blätter*, 1931, p. 474, criticizes such rules as being contrary to the theory of the separation of powers which prevails in the Austrian Constitution.

⁴³ Cf. Jordan, *loc. cit.* 457, and in all the cases mentioned so far except the decision cited in note 39 *supra*.

⁴⁴ See pp. 470-472, *infra*.

⁴⁵ Under internal law the President shall sign a document of ratification for any such treaty. Insofar as such treaties do not provide an exchange of documents of ratification, these documents are deposited in the Austrian State Archives.

⁴⁶ The Austro-French Cultural Agreement of March 15, 1947 (BGBl. No. 220/1947, 12 U.N. Treaty Series 109, No. 182), was adopted under these procedures. In the

Under Article 66 (2) of the Constitution the President may delegate his treaty-making power in all except the above-mentioned cases to the Federal Government or the Federal Ministers concerned. By Presidential Resolution of December 31, 1920 (BGBl. No. 49/1921), the President has retained for himself the treaty-making power in the above-mentioned cases as well as in the case of treaties specifically designated as "treaties" in their title and in the case of international agreements concluded by an exchange of documents of ratification. Although the President does not have to submit the last-mentioned types of treaties to the *Nationalrat* for approval, his treaty-making power in these cases is still under indirect parliamentary control. All acts of the President in the field of treaty-making shall be countersigned by the Federal Chancellor or by the Federal Minister concerned (Article 67 (2)), whose approval of the President's action is open to a parliamentary vote of censure, which would cause the overthrow of the government (Article 74 (1)). The treaty-making power of the Executive in respect to other treaties than those coming under Article 50 is thus co-ordinated with the power to issue ordinances.⁴⁷

By the same Resolution of December 31, 1920, the President delegated the rest of his treaty-making power

(a) to the Federal Government insofar as such agreements affect more than one Federal Ministry (inter-governmental agreements—*Regierungs-Übereinkommen*);

(b) to the Federal Minister concerned in agreement with the Federal Minister of Foreign Affairs insofar as such agreements interest only one Federal Ministry (inter-departmental agreements—*Ressortübereinkommen*);

(c) to the Federal Minister concerned insofar as such agreements are of a merely technical or administrative nature and interest one Federal Ministry only (inter-agency agreements—*Verwaltungsübereinkommen*).

In 1921, Bittner criticized this delegation of treaty-making power as too far-reaching. He considered the delegation under (c) above contrary to customary international law and thought it detrimental to a uniform direction of foreign affairs. He feared that other states would not con-

⁴⁷ In the very Notes submitting the agreement to the *Nationalrat* (Annex No. 344 to the Stenographic Records, V. Legislative Period) the Government adopted the view that the agreement intended to change the Federal Constitution, as it exempted French cultural institutions not only from Federal but also from *Land* taxes. This is too narrow a construction of the Federal treaty-making power, cf. p. 471 *infra*; all the more so, in the case of conflicts between *Länder* taxes and treaties is especially provided for in Par. 7 (4) of the constitutional law, BGBl. No. 45/1948. Contrast the provision of Art. 9 of the Austro-German Agreement of Nov. 23, 1951, BGBl. No. 10, 1953, on the one hand, which exempts certificates required for the purpose of carrying out the agreement from (all) taxes ("... von den Abgaben"). This agreement was not supposed to involve changes in constitutional law (Annex No. 544 of the Stenographic Records of the *Nationalrat*, VI. Legislative Period).

⁴⁸ Josef Unger, quoted by Leonidas Pitamic in "Die parlamentarische Mitwirkung an Staatsverträgen in Österreich," 12 Wiener staatswissenschaftliche Studien 72 (1936); see p. 461 *infra*.

form to this new Austrian practice and would continue to have inter-agency agreements concluded by their ministers for foreign affairs.⁴⁸ Experience has proved these fears to be unfounded.⁴⁹

Some elements of the above-mentioned classification of international agreements require closer definition. This is especially true of the hard-to-define notion⁵⁰ of political treaties.⁵¹ At least this much is certain, that the Austrian Government considers all international agreements to be "political treaties" which, although non-self-executing, bind Austria to future legislative action⁵² (e.g., the conventions adopted at the International Labor Conferences of the I.L.O.), as they tie the hands of the Austrian legislature,⁵³ which by the adoption of the agreements is certainly bound under international law to refrain from regulating the matters concerned in a manner contrary to the agreements.⁵⁴

The notion of "treaties involving changes in laws" has also been interpreted⁵⁵ in a sense favorable to direct parliamentary control of the treaty-making power. According to some decisions of the Supreme Court, any international agreement which may possibly entail future budgetary expenditure is a treaty involving changes in a law (in this case in the budget law of a future financial year), even if it is uncertain that such expenses will actually be incurred. These decisions seem to go too far,⁵⁶ as practically all international agreements involve at least a risk of future budgetary expenditure.⁵⁷

⁴⁸ Ludwig Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* 76-81 (1924).

⁴⁹ The agreement cited in note 138 *infra* is a demonstration that even multilateral agreements are concluded as interdepartmental agreements.

⁵⁰ Kunz, *loc. cit.* 305, pleads for a restrictive interpretation of this word.

⁵¹ The Austro-Czechoslovak Treaty of Dec. 16, 1921 (BGBl. No. 173/1922, 9 League of Nations Treaty Series 248, No. 257), is explicitly designated by its title as a "Political Agreement." This treaty contains a mutual guaranty of the respective frontiers, a pledge of neutrality in case one of the parties should become involved in defensive warfare and a promise not to support plans for the re-establishment of the *ancien régime*. The treaty also provides for arbitration.

⁵² In this sense Pitamic, *loc. cit.* 106. Art. 51 (3) of the 1934 Constitution expressly assimilated treaties involving actual changes in laws and treaties obliging Austria to enact legislative measures.

⁵³ Explanatory note of the Austrian Government submitting Conventions No. 99 and No. 100 adopted at the 34th International Labor Conference to the *Nationalrat's* approval, Annex No. 73 to the Stenographic Records of the *Nationalrat*, VII. Legislative Period (1953).

⁵⁴ Art. 68 (2) of the 1934 Constitution provided a simplified approval of the legislative bodies for such political treaties as do not involve changes in laws.

⁵⁵ Supreme Court, Feb. 20, 1952, 5 *Österreichische Zeitschrift für öffentliches Recht* 564 (1953).

⁵⁶ Pitamic, *loc. cit.* 87-88, shares the opinion of the court. He does, however, discuss the problem under the relevant constitutional provision of the Austro-Hungarian Monarchy (Art. 6 of the Law of Dec. 21, 1867, RGBl. No. 145), which expressly provided that treaties imposing charges on the Empire ("welche das Reich belasten") required parliamentary approval.

⁵⁷ The Administration's practice does not conform to the stringent rules set up in these decisions. Thus Austria joined UNESCO (BGBl. No. 49/1949) without this

The first decision as to the classification of an international agreement and hence the original choice of the procedure required for its adoption lies with the Administration, which is, however, subject to parliamentary as well as judicial control.⁵⁸ In the last resort, it is the duty of the courts to determine whether an international agreement comes under the category of "political treaties and treaties involving changes in laws." This control is exercised in virtue of their power to control the due publication of laws and treaties.

(b) Enlargement of the Treaty-Making Power of the Executive

The stringency of these rules and of their interpretation constitutes a handicap to the international bargaining power of the Executive. The delays involved in obtaining the approval of the *Nationalrat* may moreover have undesirable effects, especially in the economic field. For these reasons several constitutional laws⁵⁹ authorized the Federal Government to conclude certain closely defined types of treaties coming under Article 50 (1) (treaties of commerce, etc.) without the *Nationalrat*'s previous approval⁶⁰ or to issue ordinances,⁶¹ under which the material provisions of trade agreements signed by Austrian negotiators should provisionally be applied as part of internal law, usually for a period not exceeding twelve months before being submitted to the *Nationalrat*.⁶²

Some ordinary laws likewise enable the Government to take legislative steps to carry out the intentions of the law concerned. This authorization not only enables the Government to issue ordinances but also to enter international commitments to this effect.⁶³

Another way to enlarge the treaty-making power of the Executive consists of incorporating into ordinary laws a clause that they shall apply

adherence having been submitted to the *Nationalrat* for approval under Art. 50. Yet states joining UNESCO assume the obligation to contribute to the costs of this organization (Art. IX of the UNESCO Constitution of 1945).

⁵⁸ See p. 457 *supra* and pp. 474-475 *infra*.

⁵⁹ Const. Law of Dec. 16, 1920, BGBl. No. 8/1921, Const. Law of May 11, 1921, BGBl. No. 293/1921.

⁶⁰ Const. laws BGBl. Nos. 425/1924 and 460/1924, Nos. 218, 284 and 455/1925, No. 187/1926, Nos. 8,112, and 113/1927, Nos. 195 and 417/1931, Nos. 71 and 238/1923; No. 101/1953. The authority granted under most of these laws was limited in time, and such treaties must be submitted to the *Nationalrat* as soon as possible.

⁶¹ For instance, ordinance of Feb. 4, 1925, BGBl. No. 59/1925, and ordinance of Oct. 28, 1953, BGBl. No. 168/1953. Such ordinances may be issued only with the approval of the Standing Committee of the *Nationalrat*.

⁶² Art. 68 (1) of the 1934 Constitution incorporated the provisions of these laws into the Constitution itself.

⁶³ For instance, the law of June 30, 1948, BGBl. No. 155, authorized the Federal Government to grant privileges and immunities to international organizations. Thanks to this law Austria could accede to the Convention concerning the Privileges and Immunities of Specialized Agencies of Nov. 21, 1947 (33 U.N. Treaty Series 261, No. I: 521, BGBl. No. 248/1950), without the approval of the *Nationalrat*. On the other hand, on the strength of this same law, the Austrian Federal Government issued the ordinance of Sept. 8, 1953, BGBl. No. 156, unilaterally granting privileges and immunities to the Inter-Governmental Committee for Migration from Europe (ICEM).

only insofar as they are not in conflict with international agreements.⁶⁴ Such provisions are construed as referring not only to treaties already concluded but also to future treaties. An international agreement embodying provisions contrary to a law containing this clause therefore does not involve changes in this law.⁶⁵

2. Necessity of Transformation

Austria adheres to the notion that international agreements concluded by or adhered to by Austria are automatically transformed into internal law.⁶⁶ Without further acts of transformation they bind the Austrian Administration. However, in order to render them binding on the public in general, a further formality must be observed. No legal norm⁶⁷ can be binding on the general public unless duly published in the *Bundesgesetzblatt*.⁶⁸ Under Article 49 (1) of the Constitution all political treaties involving changes in laws shall be published in the *Bundesgesetzblatt*.⁶⁹ As for other international agreements their publication in the *Bundesgesetzblatt* is optional.⁷⁰

Self-executing agreements involving no change in existing laws will be published at least in all those cases where they affect rights of the public in general. There are, however, international agreements which can be fulfilled by administrative action only. This is the case of non-self-executing agreements involving no change⁷¹ in existing laws,⁷² and of agreements which, although self-executing, do not aim at binding the

⁶⁴ For instance, Par. 12 of the Passport Law, BGBl. No. 57/1951: "Persons, other than Austrians, shall cross the Austrian border only if they hold an Austrian visa, unless *international agreements* [italics supplied] or a decree of the Federal Ministry of the Interior provides otherwise."

⁶⁵ For instance, the Austro-Swiss Inter-Government Agreement of Sept. 14, 1950 (BGBl. No. 202/1951), concerning the mutual abolition of visas for Austrian and Swiss nationals.

⁶⁶ Verdross, *Verhandlungsschrift* 235.

⁶⁷ Except the generally recognized rules of international law. See p. 455 *supra*.

⁶⁸ Par. 4 (1) of the Law concerning the *Bundesgesetzblatt* (BGBl. No. 33/1920), as amended by the laws BGBl. No. 435/1922 and BGBl. No. 277/1925; Adamovich, *op. cit.* 264.

⁶⁹ Some treaties of these types nonetheless expressly provide that they shall be published in the official gazettes of the states concerned (*e.g.*, Art. 18 of the Austro-Swiss Rhine Regulation Convention of Nov. 19, 1924, BGBl. No. 436/1925). As far as Austria is concerned, such provisions refer to publication in the *Bundesgesetzblatt*. This clause is superfluous in the case of treaties approved under Art. 50. It was eliminated when the Rhine Regulation Convention of 1924 was replaced by the Convention of April 10, 1954, BGBl. No. 178/1955.

⁷⁰ Par. 2 (3) of the Law concerning the *Bundesgesetzblatt*.

⁷¹ Non-self-executing agreements involving changes in laws have to be published in the *Bundesgesetzblatt* as they are "political treaties." *Cf.* p. 458 *supra*.

⁷² A case in point is the multilateral inter-departmental Agreement of 1922 on Fishing in Lake Constance, mentioned in note 138 *infra*. This agreement was never published. It did not involve changes in laws, as the Vorarlberg Fishing Laws of Feb. 21, 1889, and June 21, 1893 (Tyrol and Vorarlberg *Landesgesetzblatt* No. 27/1891, and No. 20/1893) left to administrative discretion the fisheries protection measures concerned. As the agreement was non-self-executing, its material provisions were incorporated into Vorarlberg law by the ordinance mentioned in note 143 *infra*.

general public but only the Administration.⁷³ Agreements of these latter types will not, as a rule, be published in the *Bundesgesetzblatt*.

3. Effect of Transformation

In view of the fact that treaties involving changes in laws must be adopted under the same procedure as the laws they aim to change (Article 50), it is logical that prior legislation is abrogated by such subsequent treaties.⁷⁴ In case of doubt,⁷⁵ the subsequent treaty⁷⁶ or law⁷⁷ should

⁷³ For instance, an inter-agency agreement on the refueling of railway engines in border stations.

⁷⁴ Thus Art. 70 of the Treaty of St. Germain abrogated the earlier Austrian law on Austrian nationality (StGBI. No. 91/1918). Persons who under Art. 70 of the treaty were excluded from acquiring Austrian nationality thereby lost automatically their Austrian nationality acquired under the prior law. No Austrian law or further administrative procedure was required to produce this effect. Const. Court, Oct. 12, 1920, Off. Coll. No. 60, and Adm. Court, Nov. 11, 1921, Off. Coll. 12,946 (A), both in Annual Digest (1919-1922), Case No. 145, p. 213; Const. Court, Oct. 13, 1922, Off. Coll. No. 154; Const. Court, May 21, 1926, Off. Coll. No. 606.

⁷⁵ In a case where the Rome Convention of Nov. 23, 1937, on Transport of Goods by Rail contained somewhat contradictory provisions (Art. 9, par. 1, subpar. 1, stating that freight rates for international carriage should be calculated according to national rates while subpar. 3 of the same paragraph provided a 15-day period for the entry into force of such rates) the Supreme Court, in its decision of Dec. 2, 1953 (82 Journal du Droit International 175 (1955)), considered that the latter provision nonetheless overrode the provision of par. 6 (5) of the Railway Traffic Law of Sept. 8, 1938 (German RGBI. II, p. 663), providing a delay of two months before rate increases should enter into force. The international agreement and the law concerned had both become effective in Austria on the same day.

⁷⁶ Adm. Court, March 10, 1923, Off. Coll. No. 13237(A). A provision in the Austro-Rumanian Trade Agreement of Aug. 14, 1920 (BGBI. No. 40), granted to the citizens of the other state "in all respects" equal rights with local citizens. Yet this provision did not prevent the expulsion of a Rumanian from Austria under the Aliens Law of July 27, 1871 (RGBI. No. 88), as another provision of the same agreement provided that the citizens of the other state should remain subject to legislation concerning the control of aliens. Moreover, the Supreme Court on March 27, 1929 (Annual Digest (1929-1930), Case No. 162, p. 263), held that a provision of the Austro-British Treaty of Commerce and Navigation of May 22, 1924 (BGBI. No. 80/1925, 45 League of Nations Treaty Series 165, No. 895), granting "free access to the Courts" to the citizens of the other contracting party did not dispense British citizens suing in Austria from furnishing security for legal costs as provided by prior Austrian legislation. In its decision of Dec. 20, 1935 (Annual Digest (1935-1937), Case No. 177, p. 380), the Supreme Court held that a provision of the Austro-British Extradition Treaty of Dec. 3, 1873 (63 Brit. and For. State Papers 213), according to which a person extradited to Austria should not be tried in Austria for crimes other than those for which he had been extradited, did not prevent the Austrian courts from taking notice of such other crimes as an aggravating circumstance when fixing the penalty to be inflicted for the crime forming the object of the extradition.

⁷⁷ Verdross, *Völkerrecht* 62 (1955). Patent Appeals Board, April 15, 1953 (*Österreichisches Patentblatt* 1953, pp. 76, 78). A case instructive in this respect was decided by the Adm. Court on Dec. 23, 1924 (Off. Coll. No. 13713 (A), Annual Digest (1919-1922), Case No. 150, p. 180). According to this decision, the wording of Art. 80 of the Treaty of St. Germain left it open to doubt whether the mere declaration of the intention to opt automatically effected a change in citizenship or whether an official recognition of the act of option was required for this purpose. An Austrian ordinance of Aug. 20,

not be interpreted as intending to abrogate existing norms. However, if no doubt is possible, a subsequent law will abrogate a prior treaty as far as the internal effects of the treaty are concerned. It is not even necessary that this intention be specifically stated in the law. It is sufficient that the material provisions of the law are in conflict with those of the earlier treaty. Thus the Administrative Court deemed it unnecessary to examine whether the Austro-Czechoslovak Treaty to Avoid Double Taxation (BGBl. No. 2/1923) was still applicable or not, as in the case concerned the provisions of the law against former National Socialists (BGBl. No. 25/1947), imposing a special atonement tax on former National Socialists, would in any case override any provision to the contrary in prior treaties.⁷⁸ This example is, however, not wholly conclusive, as the law against former National Socialists is a constitutional law and thus capable of superseding any provisions of the Constitution. As, however, the court did not mention this fact, it may be assumed that it would have adopted the same attitude, even if the law concerned had been an ordinary law. In two other decisions, the provisions of the same law restricting for a certain period some civil rights of former National Socialists were held to override the civil rights provisions contained in Section V of Part III of the Treaty of St. Germain (StGBL. No. 303/1920), although Article 149 of the Federal Constitution provided that these provisions should be deemed constitutional laws in addition to the Constitution itself. In view of this situation, the Constitutional Court in these cases stressed the fact that the law against former National Socialists was likewise a constitutional law and thus capable, as far as internal effects are concerned,⁷⁹ of abrogating even a

1920 (StGBL. No. 397/1920) could also be interpreted either as considering this official recognition as a constitutive element of the option or merely as declaratory. The doubt was solved by the Austro-Czechoslovak Treaty on Citizenship of June 7, 1920 (BGBl. No. 163/1921, 3 League of Nations Treaty Series 190, No. 98), which made it clear that the recognition was intended to be merely declaratory. This interpretation was held to be valid not only between Austria and Czechoslovakia but also between Austria and the other partners of the Treaty of St. Germain. On Oct. 30, 1929 (Off. Coll. SZ XI (1929), No. 218, p. 625, Annual Digest (1929-1930), Case No. 234, p. 364), the Supreme Court interpreted the Yugoslav Railway Rates Ordinance of Oct. 1, 1926, in a way opposed to its literal meaning, but in the spirit of the Austro-Yugoslav Treaty of Commerce of Sept. 3, 1925 (BGBl. No. 246/1926, effective Aug. 12, 1926), in order to avoid a conflict between their provisions; cf. note 112 *infra*.

⁷⁸ Adm. Court, April 14, 1949, Off. Coll. No. 92 (F) (Österr. Juristenzeitung, 1949, p. 436): "The reference of the claimant to . . . the Treaty fails. The Law against former National Socialists, which was adopted subsequent to the Treaty, ordered the tax to be assessed also from the property which the persons concerned held abroad. The Law does not restrict the application of this rule to cases where Tax Agreements do not contain any provisions to the contrary. Thus the claimant could not refuse to pay tax for his property formerly held abroad, even if the provision of the Law against former National Socialists would violate the Treaty referred to by the claimant."

⁷⁹ This is explicitly stated by the Constitutional Court in its decision of Dec. 13, 1948 (Off. Coll. No. 1708): "The relevant provisions of the Treaty . . . have been declared to be a Constitutional Law. . . . This provision of Austrian Constitutional Law may, however, be altered by a subsequent Constitutional Law . . ." "Just this has

treaty which had been thus incorporated into the Constitution. The court went on to state that a private Austrian citizen was not authorized to file a complaint concerning this breach of international obligations assumed in the treaty (as only the Members of the League of Nations Council were entitled to do so under Article 69 of the treaty) and that, moreover, the Constitutional Court was not the proper forum where such allegations could be discussed.⁸⁰ The Supreme Court applied the rule that a prior treaty shall be overruled by a subsequent law also in respect to a foreign law. In an advisory opinion⁸¹ it stated that the Joint Resolution of the United States Congress of June 5, 1933, concerning the abolition of gold clauses, being the proper law of the contract, released the Austrian Government of its obligation to respect the gold clause in its dollar loan agreements of 1922 (BGBl. No. 842/1922, and 1930, BGBl. No. 86/1930).⁸²

4. *Applicability of International Agreements as a Result of Their Transformation*

Under Article 49 (1) of the Constitution all political treaties and treaties involving changes in laws shall be published in the *Bundesgesetzblatt*. Unless they contain provisions to the contrary, they shall have binding force from the expiration of the day of publication of the issue concerned of the *Bundesgesetzblatt*.

This rule cannot influence the beginning of the validity of international agreements in international law.⁸³ As Austria refuses to treat as nullities, so far as their effects in international law are concerned, even agreements concluded in violation of the basic principles of the Constitution it cannot attach such far-reaching importance to the fulfilment of a rule which, after all, is of a formal nature.

This rule, on the other hand, authorizes the retroactive entry into force of international agreements.⁸⁴ However, unless special provisions are made,⁸⁵ treaties have no retroactive effect. Thus a Rumanian, having paid security for legal costs, could not withdraw his deposit when the Austro-Rumanian Legal Aid Agreement of February 17, 1925 (BGBl. No.

being effected by the Law against former National Socialists. *It is only the domestic aspect which concerns us here, and not the international one.*" [Italics supplied.]

Const. Court, March 9, 1948, Off. Coll. No. 1607, and Dec. 13, 1948, Off. Coll. No. 1708 (Juristische Blätter, 1949, p. 160).

Advisory Opinion of Nov. 26, 1935, Amtsblatt der österreichischen Justizverwaltung 1935, p. 106, at p. 117; Journal du Droit Int., 1936, pp. 442-443, 717-725; Kopelzon, "Du Conflit entre le traité international et la loi interne," 18 Revue de Droit International et de Legislation Comparée 107 (1937), misunderstood a passage in the opinion, which is entirely *obiter*, as being decisive. In this passage the court discusses the possibility of refusing to apply the Joint Resolution as being contrary to public policy of unconditional fidelity to treaties, but rejected this argument.

In its decision of July 10, 1936 (Journal du Droit Int., 1937, p. 334), the Supreme Court upheld the views contained in this advisory opinion.

Contra, Kelsen, 5 *op. cit.* 132, 135-136. ⁸³ *Cf.* p. 474 *infra*.

⁸⁴ Kelsen, *ibid.* 129-130.

⁸⁵ For instance Art. 20 (2) and the clause of promulgation of the Austro-Swiss Social Insurance Convention of July 15, 1950 (BGBl. No. 232/1951).

82/1926) came into force while his case was still pending.⁸⁷ In some cases states, when signing a draft international agreement, have at the same time signed an additional protocol providing that they will immediately apply the provisions of the main agreement pending its ratification.⁸⁸ As far as Austria is concerned, a promise of this nature could be effective as internal law only if the provisions of the main agreement were nonpolitical and did not involve changes in existing laws.⁸⁹ In such a case, the signing of the additional protocol would be equivalent to issuing an ordinance.

The approval of an international agreement by the *Nationalrat* does not yet transform its contents into internal law. On December 5, 1924, the *Nationalrat* approved⁹⁰ the Belgrade Agreement of September 12, 1924,⁹¹ Article V of which provided that persons domiciled⁹² in towns divided by the Austro-Yugoslav border should be deemed nationals of the state which had acquired the greater part of the town. As Yugoslavia failed to ratify the agreement, Austria likewise refrained from ratification. In a case subsequent to these events an Austrian *Land* Government had solved this problem by linking nationality to the location of the house from which the person concerned derived his "citizenship" (*pertinenza*) in the town concerned. Upon appeal, the Federal Court ruled⁹³ that this method of deciding the case was "not illegal. An explicit regulation of the problem by means of an agreement between the states concerned, such as had been *prepared* [italics supplied], has not become legally effective. Thus the decision does not run counter to any norm of law."

Even a duly ratified and published convention has no internal effect whatsoever before the date which the convention itself provides for entry into force. Thus on May 23, 1951, a Disciplinary Appeals Commission had ordered the dismissal of a police inspector who, on September 30, 1950, while on duty, had left his post without the leave of his superior officers in order to attend, as a Trade Union Representative, a meeting alleged to have been held by the Trade Union. The Constitutional Court⁹⁴ held

⁸⁷ Supreme Court, Sept. 29, 1926 (*Journal du Droit Int.*, 1928, p. 191), *contra* Reisler in 8 *Die Rechtsprechung* 176 (1926).

⁸⁸ Bittner, *op. cit.* 262, note 1053, quoting *inter alia* the Agreement of July 1, 1880, concerning the immediate applicability of the decisions reached at the Congress of Berlin.

⁸⁹ Par. 3 of the Protocol of Provisional Application of the EPU Agreement of Sept. 19, 1950 (*Journal du Droit Int.*, 1950, p. 1039), as well as Art. 24 of the OEEC Convention of April 16, 1948 (*ibid.*, 1946-1948, p. 382), which aims to put these international agreements into operation on signature on a provisional basis, contains a reservation in favor of the constitutional requirements of those member countries where such action would be unconstitutional. Huet, "Aspects Juridiques de l'Union Européenne de Paiements," *ibid.*, 1951, pp. 806-810.

⁹⁰ Stenographic Records, II. Legislative Period, p. 1861.

⁹¹ Annex No. 210 to the Stenographic Records of the *Nationalrat*, II. Legislative Period.

⁹² Under Art. 70 of the Treaty of St. Germain, the nationals of the former Austro-Hungarian Monarchy acquired the nationality of the successor state exercising sovereignty over the place where they possessed rights of citizenship (*pertinenza*), *i.e.*, roughly domicile.

⁹³ Federal Court, Feb. 7, 1936, Off. Coll. No. 819 (A).

⁹⁴ Const. Court, March 28, 1952, Off. Coll. No. 2311; *cf.* also note 35 *supra*.

that, even apart from other considerations,⁹⁵ the claimant could not avail himself of the provisions of the I.L.O. Convention concerning Freedom of Association and Protection of the Right to Organize (BGBl. No. 228/1950), as it had not yet come into force at the time of his dismissal. Austria had ratified this convention on September 6, 1950, but by virtue of its Article 15 (3), it "shall come into force for any Member two months after the date on which its ratification has been registered." In the case of Austria this effective date was October 18, 1951.

On the other hand, the Supreme Court in a decision of June 21, 1953,⁹⁶ took into consideration Article 11^{bis}, sub-paragraph 3, of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Brussels on June 26, 1948, at a time between the date of the Austrian signature (June 26, 1948) and its entry into force in respect to Austria (October 14, 1953).⁹⁷ The case concerned the question whether the reproduction of ephemeral recordings made by a broadcasting body for its own emission violated paragraph 15 of the Austrian Copyright Law. That provision was silent on this special point. Article 11^{bis}, sub-paragraph 3, of the convention which was adopted in Brussels provides that, unless special provisions are made, the authorizing of radio-diffusion does not imply permission to record the radio-diffused work for re-diffusion. The Supreme Court stated that the provisions of the convention adhered to by Austria ("*unter dem Beitritt Österreichs getroffene Übereinkommen*")⁹⁸ shall be taken into consideration under paragraph 7 of the Austrian General Civil Code (ABGB)⁹⁹ when construing the Austrian Copyright Law.

As non-self-executing international agreements involving future change in existing law have to be published in the *Bundesgesetzblatt* as "political treaties,"¹⁰⁰ they also become part of the internal law of Austria. Yet as they do not contain any detailed rules capable of enforcement, the courts refuse to apply even the broad principles which could, at least, be deduced from such agreements. Thus, no rights could be based on the preamble of the Amended Text of the Constitution of the I.L.O. and on the Declaration concerning the aims and purposes of the I.L.O. annexed thereto (BGBl. No. 223/1949),¹⁰¹ "as they contain merely a program, the several items whereof require the conclusion of special agreements in order

⁹⁵ The dicta of the Court are twice *obiter*. Under Art. 9 of the convention, the provisions provided therein do not automatically apply to the police force. Moreover, the meeting concerned had not been convened by the Trade Union.

⁹⁶ Off. Coll. SZ XXIII, No. 207.

⁹⁷ BGBl. No. 183/1953. The *Nationalrat* had approved this convention on July 19, 1953.

⁹⁸ BGBl. No. 11/1936 as amended by BGBl. No. 206/1949.

⁹⁹ Par. 7, ABGB, reads as follows: "If a case can be decided neither on the strength of the words of a law, nor of the meaning, which reasonably can be attributed to it, nor, the Court shall take into consideration similar situations explicitly settled by other laws, and the aims of other laws, related to the law concerned. If the case still is doubtful, it shall be decided according to the principles of natural justice taking into consideration the circumstances of the case, after these have been carefully examined and duly weighed."

¹⁰⁰ See note 53 *supra*.

¹⁰¹ 15 U.N. Treaty Series 35, No. 1-22

to become binding.”¹⁰² Under Article II, sub-paragraphs 19 and 20 of the Venice Protocol of October 13, 1921, concerning the Settlement of the West Hungarian Question (BGBl. No. 138/1922),¹⁰³ Austria engaged herself, subject to the result of an examination of the circumstances in each particular case, not to dismiss en masse and for political reasons Hungarian officials in the territory ceded to Austria, and in principle to assume responsibility for pensions due to these officials. Detailed provisions in this connection were to be made by special agreement between the Austrian and Hungarian governments. By themselves, the provisions of the main agreement were held to be too vague to grant individual officials a right to be maintained in office or to a pension.¹⁰⁴ The Protocol was held “to establish merely a principle subject to exceptions to be defined by detailed provisions. As long as these enabling provisions have not come into force, no individual rights could be deduced from the Protocol itself.”

5. *Interpretation of Treaties by the Courts*

The theory of the separation of powers, as understood in Austria, leaves the courts free to interpret treaties without seeking the guidance of the Administration.¹⁰⁵ Therefore, in some instances courts have upheld claims which the Administration had originally rejected under its interpretation of the treaty concerned.¹⁰⁶

6. *Termination of Treaties*

Although in Austria only a rule of equal rank with a law is held capable of terminating the validity of a law,¹⁰⁷ actual practice concerning treaties does not follow this example. The Constitution is silent on this point. Thus, the International Phylloxera Convention of November 3, 1881 (RGBl. No. 105/1882) had come into force with parliamentary approval. Yet, on September 5, 1950, Austria gave notice of termination of this convention by virtue of a decision adopted by the Federal Government¹⁰⁸ without having obtained parliamentary approval for this step.

¹⁰² Const. Court, March 28, 1952, Off. Coll. No. 2311. To the same effect, Supreme Court, Jan. 5, 1926 (Journal du Droit Int., 1928, p. 193), in respect of Art. 62 of the Treaty of St. Germain.

¹⁰³ 9 League of Nations Treaty Series 204, No. 254. On this agreement in general *cf.* Kunz, *loc. cit.* 298.

¹⁰⁴ Const. Court, March 31, 1924, Off. Coll. No. 272, and May 19, 1925, Off. Coll. No. 598; to the same effect, Supreme Court, March 5, 1929 (Annual Digest (1929-1930), Case No. 40, p. 65), and July 9, 1931 (*ibid.* (1931-1932), Case No. 32, p. 65), in respect of Art. 203 of the Treaty of St. Germain, providing “that Austria shall assume responsibility for a portion of the debts of the former Austrian Government which is especially secured on railways . . . in proportion to the railways transferred to Austria.”

¹⁰⁵ See, however, p. 456 *supra*.

¹⁰⁶ For instance, Adm. Court, Dec. 23, 1924, Off. Coll. No. 13713(A), note 77 *supra*.

¹⁰⁷ Const. Court, Oct. 8, 1948, Off. Coll. No. 1695.

¹⁰⁸ Announcement of the Federal Chancellery of Dec. 7, 1950, BGBl. No. 17/1951.

B. INTERNATIONAL AGREEMENTS IN THE FRAMEWORK OF THE AUSTRIAN CONSTITUTION

1. Rank of International Agreements in Internal Law

As has already been pointed out,¹⁰⁹ international agreements concluded with the approval of the *Nationalrat* under Article 50 of the Constitution rank equal¹¹⁰ with Federal or *Länder*¹¹¹ laws,¹¹² while all other international agreements rank equal with ordinances issued by the Federal or *Land* Administration.

This co-ordination goes so far that a treaty is held to be a sufficient basis on the strength of which the Administration may issue an ordinance,¹¹³ although under Article 18 (2) of the Constitution all ordinances shall be issued only on authority for this purpose contained in a law.¹¹⁴

In 1922 Kunz¹¹⁵ maintained that all international agreements concluded by Austria should rank as constitutional laws. This theory is based on the fact that all international agreements are anchored in the maxim, *Pacta sunt servanda*, which is one of the generally recognized rules of international law. As these rules are a part of the Federal law under Article 9, and as the breach of any agreement would obviously violate the *Pacta sunt servanda* rule, Kunz concludes that an agreement could be overruled only by a law having equal rank with Article 9, *i.e.*, by a constitutional law.¹¹⁶ However, Article 149 bestowing on certain provisions of the Treaty of St. Germain the rank of a constitutional law would be superfluous, if all international agreements enjoyed this rank without

¹⁰⁹ See pp. 460-463 *supra*.

¹¹⁰ See note 113 *infra* on a broader assimilation of international agreements with laws rather than with ordinances.

¹¹¹ On the aspects of the federal structure of Austria in respect to our problem, see pp. 470-472 *infra*.

¹¹² A subsequent ordinance therefore can supersede only such international agreements as do not rank equal with laws. This may be the reason underlying the decision of the Supreme Court of Oct. 30, 1929, cited in note 77 *supra*.

¹¹³ Ordinance of the Federal Ministries of Trade and Agriculture of Feb. 26, 1923 (BGBl. No. 108/1923), concerning the protection of French regional appellations in respect to wine and spirits made pursuant to Art. 227 of the Treaty of St. Germain. Ordinance of the Federal Ministry of Education of June 30, 1949 (BGBl. No. 211/1949), establishing an Austrian UNESCO Commission. According to the preamble of this ordinance it was issued "Pursuant to Art. VII (1) of the UNESCO Constitution" (BGBl. No. 49/1949) concerning the formation of national co-operating bodies. This latter case is all the more remarkable, as the UNESCO Constitution was not adopted under the procedure of Art. 50 of the Federal Constitution, and hence should not have been held equal to a law. In a somewhat similar manner the Constitution of the WHO (BGBl. No. 96/1949), which was also not adopted under Art. 50, served as basis for introducing the International Sanitary Regulations of May 25, 1951, into the Austrian legal system. This was effected not by ordinance but by simple publication of an official announcement (*Kundmachung*) of the Federal Government of June 13, 1953, in the Bundesgesetzblatt No. 97/1953 to the effect that these regulations have become effective in Austria pursuant to Art. 22 of the Constitution of WHO.

¹¹⁴ See note 119 *infra*.

¹¹⁵ Kunz, *loc. cit.* 320.

¹¹⁶ By this construction Kunz aims to conform the Austrian Constitution to the monistic ideal of the superiority of international law over internal law.

specific provisions to this effect. The Constitutional Court has rightly rejected the claim that any but the above-mentioned provisions of the Treaty of St. Germain are guaranteed by the Constitution, *i.e.*, should rank as constitutional laws.¹¹⁷

2. *Constitutional Limitations on the Content of International Agreements*

Due to the co-ordination of international agreements with internal law, the constitutional limitations imposed on the legislative authorities in the making of internal laws apply also to their treaty-making power. Thus what cannot be done by ordinary law cannot be done by treaty. Article 50 (2) provides that provisions of the Constitution may be overruled by treaties adopted under the same conditions as constitutional laws.¹¹⁸ It follows, *a contrario*, that ordinary treaties (like ordinary laws) must conform to the provisions of the Federal Constitution.

(a) Delegation of Legislative Power

Thus, the Constitutional ban on the delegation of legislative powers (Article 18)¹¹⁹ applies not only in the field of strictly internal law but also to international law insofar as the latter is transformed into internal law. Hence ordinances, rules or "interpretations" issued by the executive board of an international organization pursuant to an article of its charter would not become part of internal law in spite of Austrian membership in the organization concerned, if their provisions would be *ultra vires*¹²⁰ if issued by the Austrian Administration under the authority of a law containing the same provisions as the charter concerned.¹²¹

There exists, however, a decision of the Constitutional Court, which seems to indicate that this court was ready to interpret Article 18 of the Constitution in a much more liberal spirit, if a delegation of legislative powers did figure in international agreements instead of in Austrian laws. Thus, an understanding between the Austrian Cardboard Cartel and an Hungarian economic corporation pursuant to the authority of Article 8

¹¹⁷ Oct. 15, 1921, Off. Coll. 1924, Annex 6. ¹¹⁸ Cf. note 23 *supra*.

¹¹⁹ This rule is very strictly interpreted as excluding practically all delegation of legislative powers to the Administration, *e.g.*, Const. Court, March 12, 1951, Off. Coll. No. 2109, and as prohibiting sub-delegations, *i.e.*, an ordinance shall not be issued on the authority of another ordinance. Const. Court, March 19, 1952, Off. Coll. No. 2276.

¹²⁰ F. A. Mann, "Der Internationale Währungsfonds und das Internationale Privatrecht," *Juristenzeitung* 1953, p. 445, note 20, doubts whether the "interpretation" given by the Board of Executive Directors of the International Monetary Fund of Art. VIII, sec. 2(b) of the Articles of Agreement (BGBl. No. 105/1949, 2 U.N. Treaty Series 39, No. I: 20(a)), pursuant to Art. XVIII of the Articles of Agreement (Fund Circular No. 8, March 15, 1950), would be accepted by the members. In Austria it may possibly be considered *ultra vires*.

¹²¹ Even a rule or ordinance which is not *ultra vires* would not be automatically applicable in Austria, if it aimed at binding the general public. It would acquire this effect only after having been published in the *Bundesgesetzblatt*. See pp. 460-461 *supra* and the WHO regulations mentioned in note 113 *supra*.

of the General Arrangement regarding Exports attached to the Austro-Hungarian Treaty of Commerce of June 30, 1931 (BGBl. No. 199/1931),¹²² was held to be a binding rule capable of limiting the rights of Austrian exporters, although this understanding had not even been published in the *Bundesgesetzblatt*.¹²³

(b) Civil Rights

In the same way, the civil rights guaranteed by the Constitution cannot be taken away by international agreements of inferior rank to these guarantees. Under Article 5 of the Basic Law of December 21, 1867 (RGBl. No. 142), on the General Rights of Citizens, which under Article 149 forms part of the Constitution, nobody may be deprived of his property except in cases provided by ordinary law. Therefore an international agreement affecting private property rights even in an indirect way, for instance, by the fact that Austria on behalf of her nationals waived all claims for compensation against the British Custodian of Enemy Property, acting in the proper discharge of his duties, for any acts or omissions while administering Austrian property, could not be concluded as an inter-governmental agreement but had to be put on the same level as a law by obtaining the approval of the *Nationalrat* under Article 50.¹²⁴

The non-observance of this rule caused considerable difficulties in the case of an agreement¹²⁵ whereby the Austrian Government leased real estate, etc., belonging to private persons to a foreign government under lease contracts concluded between that government and the Austrian Government for each specific leased item.

The Austrian Administration indemnified the owners of the leased estates out of the sums received as lease. However, the owner of a house leased under such a contract brought a suit before the Constitutional

¹²² 122 League of Nations Treaty Series 315, No. 2800(4): "The High Contracting Parties shall encourage the conclusion of special arrangements between corporations in both countries entrusted by each of them with the execution of the present Arrangement, with a view to facilitating exports and promoting as far as possible their expansion.

"The two Governments shall be empowered to take the necessary steps for the execution of the present Arrangement and to provide the said corporations with the necessary means for the purpose."

¹²³ Const. Court, Feb. 9, 1932, Off. Coll. No. 1433. Pursuant to Art. 8 of this Arrangement (p. 1003 of the *Bundesgesetzblatt*, 1931), the Austrian Cardboard Cartel and the Hungarian economic corporation had agreed on a reduction of the Hungarian tariff on cardboard exported under the auspices of the Cartel. A non-cartel exporter, who had been refused a quota in the cartel's contingent, complained of discrimination. The court held that he was not discriminated against as he was free either to join the Cartel or to export at the full tariff rate. The price conditions imposed by the Cartel were held to be legal norms covered by Art. 8 of the agreement. The fact that they had not been published in the *Bundesgesetzblatt* was held to be immaterial, as they had been made known to all exporters through other channels.

¹²⁴ Annex 442 to the Stenographic Records of the *Nationalrat*, VI. Legislative Period, Report of the Federal Government submitting to the *Nationalrat* the Money and Property Agreement of June 30, 1952 (BGBl. No. 193/1952).

¹²⁵ 67 U.N. Treaty Series 99, No. I: 869.

Court for alleged infringement of his property rights. The court held ¹²⁶ that it could find no legal rule ¹²⁷ authorizing the Austrian Government to conclude with a third party any lease contract on behalf of the owner of the house without having obtained his authority. The leasing of the house was held an illegal infringement of the owner's property rights.¹²⁸ However, the Constitutional Court refrained from ordering the Government to restore the house to the owner,¹²⁹ as this would have involved declaring null and void the contract between the Austrian Government and the foreign government.¹³⁰ The court considered that such a declaration would have been outside the powers granted to it under the Constitution.¹³¹

3. *The Effects of the Federal Structure of Austria on International Agreements*

Austria is a federal state. Under Article 10 (1), Sub-paragraph 2, of its Constitution the conclusion of *all* international agreements¹³² is a Federal matter,¹³³ even if they concern matters which otherwise would come under the competence of *Land* legislation.¹³⁴ Thus the conclusion

¹²⁶ Decision of Oct. 9, 1948, Off. Coll. No. 1701.

¹²⁷ This finding of the court implies that it did not consider the intergovernmental agreement concerned to constitute such a legal norm. See pp. 472-473 *infra*.

¹²⁸ To the same effect, Supreme Court, April 29, 1953 (Salzburger Nachrichten (Der Staatsbürger), Sept. 1, 1953). According to this decision the Austrian Government, when concluding the lease contract, had acted as trustee of the owner without having obtained the latter's authority and without a legal basis for its action. The Government therefore had to account to the owner for the sums received under the lease contract. The plea of the Government that it had concluded the lease contract in virtue of an international agreement and that the conclusion of this agreement was an act of state was held immaterial.

¹²⁹ Decision of Dec. 14, 1948, Annex 7 to Off. Coll. for 1948. However, the decision of the court was thereby not deprived of effect, as the Austrian Government subsequently legalized these contracts by requisitioning the houses concerned under Austrian law. This practice was held legal by the courts. Adm. Court, Nov. 16, 1949, Off. Coll. No. 1092 (A); Const. Court, June 28, 1949, Off. Coll. No. 1813 (Juristische Blätter, 1949, p. 501).

¹³⁰ This part of the decision cited in notes 126 and 129 *supra*, is criticized by Wilhelm Herz, "Erklärung der Unzuständigkeit als Kompetenzüberschreitung," Österreichische Juristenzeitung, 1949, p. 413; and "Feststellungserkenntnisse des Verfassungsgerichtshofes," Juristische Blätter, 1950, p. 500, *contra* Adamovich, "Probleme der Verfassungsgerichtsbarkeit," *ibid.*, p. 76.

¹³¹ See p. 473 *infra*.

¹³² The Federation has, however, concluded international agreements which, inside Austria, were applicable only in the territory of a particular *Land*; for instance, the treaties of Feb. 23 and June 24, 1925 (BGBl, Nos. 176 and 177/1926), with Italy concerning certain problems resulting from the cession to Italy of parts of Tyrol and Carinthia, respectively.

¹³³ Hence the Trade Agreements of 1945 between Vorarlberg and Switzerland and between Tyrol and Switzerland were unconstitutional. See p. 474 *infra*.

¹³⁴ Kelsen, 5 *op. cit.* 82; Hlavac, *op. cit.* 21, note 12, is right in thus extensively interpreting a statement by Adamovich, *op. cit.* 266, which is merely concerned with the predominance of the Federal treaty-making power over the administrative power of the *Länder*.

of treaties concerning the protection of birds¹³⁵ and labor relations¹³⁶ are approved by the Federal legislative organ, the *Nationalrat*, although legislation for the protection of birds is normally a *Land* matter, while labor relations would normally be a *Land* matter insofar as labor relations between a *Land* and its civil servants are concerned. Such treaties are not considered as "treaties involving changes in constitutional law" within the meaning of Article 50 (2) and hence are approved by simple majority vote.¹³⁷ Likewise executive agreements in these fields are concluded by the Federal and not by the *Land* Executive.¹³⁸ A self-executing international agreement will thus override not only prior Federal but also prior *Land* laws in conflict with the agreement concerned.¹³⁹

A *Land* law in conflict with a prior treaty would be unconstitutional as encroaching on the competence of the Federal Legislature. Insofar as a matter is regulated by treaty, it becomes a Federal matter on account of the exclusive treaty-making power of the Federation, even if the *Land* law concerned dealt with a subject otherwise within the legislative power of the *Länder*.¹⁴⁰

The Constitution took great care to ensure that the rights of the *Länder* should not prevail over the treaty-making power of the Federation. In case of non-self-executing international agreements concluded by Federal agencies in *Land* matters, the *Länder* are bound to take all measures, including those of a legislative nature, required to fulfil the agreement (Article 16 (1)). Should a *Land* fail to do so, its rights in the matter concerned pass to the Federation. As there is no time limit attached to this rule, the legislative power concerned stays with the Federation in respect to the *Land* concerned.¹⁴¹ Thus, the *Land* would be unable to repeal by subsequent *Land* legislation a law passed by the Federation under this emergency rule. In addition to this general rule, paragraph 7 (4) of the constitutional law regulating Federal and *Land* taxation provides that the Federation may interfere with *Land* taxation powers in

¹³⁵ The Convention of March 19, 1902, on Protection of Birds Useful to Agriculture was declared applicable in the territory of the Austrian Republic by ordinance of the State Government of Austria (the predecessor of the Federal Government) of June 15, 1920 (StGBI. No. 304/1920), in virtue of Art. 234 of the Treaty of St. Germain.

¹³⁶ According to Annex 73 to the Stenographic Records of the *Nationalrat*, VII, Legislative Period, I.L.O. Convention No. 100 (BGBl. No. 39/1954), "concerning Equal Remuneration for Men and Women Workers for Work of Equal Value," refers also to the civil servants of the *Länder*.

¹³⁷ H'avač, *op. cit.* 21.

¹³⁸ The agreement reached by the Lake Constance Conference in 1922 concerning the limitation of certain types of fishing on Lake Constance was signed on behalf of Austria by officials of the Federal Ministry of Agriculture and Forestry (Bernhard Schuster, *Die Entwicklung der Hoheitsverhältnisse am Bodensee seit dem 30 jährigen Krieg* (Constance, 1951) 133), although fishing is a *Land* matter.

¹³⁹ H'avač, *op. cit.* 21; Kelsen, 5 *op. cit.* 82.

¹⁴⁰ *Idem* 83.

¹⁴¹ This is deduced, *a contrario*, from the fact that Art. 15 (6), which provides for similar sanction for *Länder* delaying to pass detailed legislation in matters where the Federation has a right to lay down broad legislative principles, contains such a time element. Adamovich, *Die österreichischen Bundesverfassungsgesetze* 57 (1947).

¹⁴² Const. Law of Jan. 21, 1948, BGBl. No. 45.

order to adapt taxes of the *Länder* to the rules of international tax law. However, there has yet been no case where a *Land* failed to pass legislation or ordinances¹⁴³ necessary to fulfil treaties or executive agreements concluded by Federal agencies. As a last safeguard Article 16 (2) of the Constitution authorizes the Federation to supervise the execution of international agreements concerning *Land* matters and to issue direct orders so as to ensure compliance with the agreements.¹⁴⁴ Once *Land* matters are regulated by international agreement they therefore practically become Federal matters.

4. *The Control of the Constitutionality of International Agreements*

It has been a matter of considerable discussion whether the Austrian Constitutional Court, which under Articles 139 and 140 of the Constitution is authorized to review the constitutionality of laws and to declare null and void such laws and ordinances as its finds unconstitutional, should have similar powers concerning international agreements concluded by Austria. An argument against this right of review is drawn from the provisions against *Land* interference with the execution of treaties. Neither the principle of the separation of the judicial and the legislative powers nor the Federal principle should be able to thwart the execution of international agreements concluded by the competent authorities.¹⁴⁵ The opponents of this theory point out that in Austria laws and treaties have been co-ordinated to such a point that treaties should be just as much open to judicial review as are laws.¹⁴⁶ The Constitutional Court has not yet ruled squarely¹⁴⁷ on the matter. Its tendencies appear, however, to be opposed to the principle of judicial review of treaties. Thus, it refused to declare unconstitutional two post-World War I ordinances¹⁴⁸ which, based on the Economic War Powers Law,¹⁴⁹ ordered the stamping of Austro-Hungarian banknotes. The court ruled that for the duration of the postwar economic state of emergency the law could still be used as a basis for ordinances, and went on: "Moreover such subsequent annulment of the two ordinances would be in contradiction with Art. 206 of the Treaty of St. Germain. . . . It is completely out of question that a measure of the Austrian Government based on international obligations should ex post facto thus be declared illegal. . . ." ¹⁵⁰ Likewise in the case of the agreement between

¹⁴³ For instance, Burgenland law of March 8, 1934, on protection of birds useful to agriculture (Burgenland Landesgesetzblatt No. 60/1934); see note 135 *supra*. Par. 25 (2) of Vorarlberg Ordinance No. 30/1936 (Vorarlberg Landesgesetzblatt 1936), transforms the 1922 Agreement on Fishing in Lake Constance into Vorarlberg law; see note 138 *supra*.

¹⁴⁴ Hlavač, *op. cit.* 21.

¹⁴⁵ Métall, 7 *Zeitschrift für öffentliches Recht* 106-118 (1928).

¹⁴⁶ Adamovich, *Grundriss* 265-266, 306, tends towards this solution; Kelsen, 5 *op. cit.* 258, leaves this question open.

¹⁴⁷ The decision cited in note 152 *infra* concerned lease contracts made pursuant to an international agreement, but not such an agreement itself.

¹⁴⁸ Ordinances of March 25, 1919, StGBI. No. 191, and Feb. 27, 1919, StGBI. No. 152.

¹⁴⁹ July 24, 1917, RGBI. No. 307/1917.

¹⁵⁰ Const. Court, Dec. 15, 1924, Off. Coll. No. 360.

the Austrian Government and a foreign government¹⁵¹ concerning the leasing of real estate, the Constitutional Court held that under the Constitution it had no power to cancel or to declare null and void the contracts made pursuant to the agreement.¹⁵² The court¹⁵³ therefore refrained from remedying a situation created pursuant to an international agreement, although it has held that the situation violates the Constitution. Yet laws found unconstitutional are declared null and void by the Court.

The exemption of international agreements from judicial review of their constitutionality is of less importance than appears at first sight. First of all, if the court should review the constitutionality of an international agreement and should find it unconstitutional, such finding could not deprive the agreement of its validity in internal law, although Kelsen draws the opposite conclusion from the wording of Article 50 (1) of the Constitution under which "treaties require for their *validity* the approval of the *Nationalrat*." According to Kelsen "validity" means validity in international law as well as in internal law.¹⁵⁵ However, Austria has refused to accept the Rumanian argument, put forward in 1922, that the Austro-Rumanian Provisional Trade Agreement of August 14, 1920, duly ratified by the King of Rumania, should be a nullity in international law, as the King had failed to obtain the parliamentary approval of the agreement required under Article 97 of the Rumanian Constitution which, in this respect, was similar to Article 50 (1) of the Austrian Constitution.¹⁵⁷ In the same sense the Supreme Court held¹⁵⁸ that an inter-

¹⁵¹ See pp. 469-170 *supra*.

¹⁵² Const. Court, Oct. 9, 1948, Off. Coll. No. 1701.

¹⁵³ See note 129 *supra*.

¹⁵⁴ 5 *op. cit.* 136, and Kunz, *loc. cit.* 305, quoting Strupp, Das völkerrechtliche Delikt 65/66, note 2.

¹⁵⁵ Pitamie, *loc. cit.* 18, discusses the provision of Art. 6 of the Fundamental Law of Dec. 21, 1867 (RGBl. No. 145), on the exercise of governmental and executive powers, which likewise required the consent of Parliament for the *validity* of certain types of treaties (see note 52 *supra*). According to him, the authors of this provision intended that such treaties should be void even in international law without parliamentary consent (*ibid.* 36-37); however, as the Austrian legislators could not alter international law, a treaty ratified by the Head of State without the necessary parliamentary approval would be internationally binding, although null and void in internal law (note 9).

¹⁵⁶ RGBl. No. 40/1920, and Monitorul Oficial of Oct. 19, 1920, No. 157.

¹⁵⁷ Austria protested against the Rumanian attitude, but did not pursue the matter any further in order not to jeopardize negotiations concerning the conclusion of a new Austro-Rumanian Trade Agreement which were then already under way. It finally led to the conclusion of the agreement contained in the exchange of notes of Feb. 5, 1924 (BGBl. No. 80/1924; Pierre Chailley, La nature juridique des traités internationaux 222-223 (1932)). In its decision of March 10, 1923 (Off. Coll. No. 122 (A)), the Adm. Court assumed that the earlier agreement was still in force (*see note 154 supra*). The Austrian point of view was likewise maintained in the later promulgation (BGBl. No. 80/1924), as its clause of promulgation in the Bundesgesetzblatt for 1924 follows: "This . . . Treaty . . . has become effective on Feb. 13, 1924. *Simultaneously* [the earlier supplied] the Provisional Trade Agreement of August 14, 1920, BGBl. No. 40/1920, has become inoperative."

¹⁵⁸ "Thus as the promise to pay embodied in the treaty concerned is in effect binding under internal law, a special Federal Law (Art. 10 (1) sub-par. 15) v-

national agreement not duly published, and hence a nullity under internal law, nonetheless constituted an agreement valid under international law.¹⁵⁹

Moreover, even in internal law the ratification of a treaty in violation of the Constitution would not be a legally irrelevant act.¹⁶⁰ Such treaties would be effective in internal law until annulled by the Constitutional Court,¹⁶¹ assuming that this court possessed such power of annulment. Thus the Trade Agreements with Switzerland concluded by the *Land* Governments of Vorarlberg and Tyrol in December, 1945,¹⁶² were clearly in violation of the provision of Article 10 (1) sub-paragraph 2, vesting the treaty-making power exclusively in the Federation. Yet these agreements were not considered complete nullities and when the Federal Government, having concluded a Trade Agreement with Switzerland on behalf of Austria as a whole on August 17, 1946,¹⁶³ decided to repair this unconstitutionality, it did not on its own behalf denounce the treaties concerned as the sole holder of treaty-making power in Austria, but induced the *Land* Governments concerned to denounce the agreements.¹⁶⁴

In view of the fact that the Constitutional Court would very likely not review the constitutionality of international agreements, there remains but one direct sanction to prevent the Administration from concluding international agreements without the approval of the *Nationalrat* in violation of Article 50. This direct sanction is impeachment before the Constitutional Court under Article 142 of the Constitution.¹⁶⁵

The Supreme Court has, however, found an indirect but much more effective sanction. Under Article 89 of the Constitution the ordinary courts, including the Supreme Court, cannot review the (constitutional) validity of duly published laws (this power of review being vested exclusively in the Constitutional Court), but they may, *a contrario*, examine whether laws they are asked to apply have been duly published. According to the Supreme Court, international agreements are for this purpose co-ordinated to laws.¹⁶⁶ Recently, when asked to apply an international agreement, the court found that the agreement concerned involved changes in the law, as it could possibly involve future budgetary expenditure.¹⁶⁷ The fact that the agreement concerned involved changes in the law brought it under the rule that such treaties shall be approved by the *Nationalrat* (Article 50) and shall be duly published in the *Bundesgesetzblatt* (Article 49). As

be required in order to regulate under internal law the compensation for war damages pursuant to the present Treaty." Supreme Court, Decision of Feb. 20, 1952, 5 *österreichische Zeitschrift für öffentliches Recht* 564 (1953).

¹⁵⁹ In the same sense Adamovich, *op. cit.* 263; Verdross, *Völkerrecht* 139 (1955).

¹⁶⁰ Adamovich, *op. cit.* 265.

¹⁶¹ Conclusion by analogy from Art. 140 (3) concerning the judicial review of laws. The finding of the Constitutional Court declaring a law unconstitutional has no retroactive effect.

¹⁶² *Die Wirtschaft*, Jan. 27, 1946; text of agreement between Vorarlberg and Switzerland in 100 Jahre Handelskammer und gewerbliche Wirtschaft in Vorarlberg (Feldkirch, 1952), p. 396. The story of this agreement is discussed *ibid.*, pp. 142-143.

¹⁶³ *Neue Zürcher Zeitung*, Aug. 19, 1946. ¹⁶⁴ *Ibid.*, June 2, 1947.

¹⁶⁵ Métall, 7 *Zeitschrift für öffentliches Recht* 117-118 (1928).

¹⁶⁶ *Contra* Métall, *ibid.* 115.

¹⁶⁷ Note 56 *supra*.

these conditions had not been complied with in the case of the agreement concerned,¹⁶⁸ the Supreme Court held it ineffective under internal law, although internationally binding.¹⁶⁹ In this indirect way there exists in Austria judicial control at least as to observance of the constitutional provisions concerning the adoption of treaties.¹⁷⁰

III. CONTROL OF COMPATIBILITY WITH INTERNATIONAL LAW OF ACTS PERFORMED IN AUSTRIA

Finally, mention must be made of Article 145 of the Constitution. This article reads: "The Constitutional Court shall give judgment upon violations of international law in accordance with the provisions of a special Federal Law." As the special Federal law has not been enacted, this article has remained inoperative.¹⁷¹ Such a law should not be construed as providing merely that individuals violating international law should be judged by the Constitutional Court.¹⁷² Why should the highest ranking Austrian court judge a soldier accused, for instance, of taking a watch from a prisoner of war? It would be much more in accordance with the other functions of the court if the enactment of the law referred to in Article 145 should enable the court to examine whether international agreements concluded or laws enacted by Austria are in conflict with Austria's prior international obligations,¹⁷³ since the enactment of such legislation would obviously constitute a violation of international law. Under this admittedly controversial interpretation of the provisions of Article 145, the *Nationalrat* would lose its powers to nullify the internal effects of international obligations by subsequent legislation, as such legislation would then be declared null and void by the Constitutional Court.¹⁷⁴

¹⁶⁸ Publication in the semi-official "Wiener Zeitung" of June 28, 1947, was held to be no substitute for publication in the *Bundesgesetzblatt*. The agreement concerned was also published in 67 U.N. Treaty Series 89, No. 1: 868.

¹⁶⁹ See note 158 *supra*.

¹⁷⁰ A strange sidelight on this case is a pending lawsuit against the Austrian Government under the Federal Torts Law of Dec. 18, 1948 (BGBl. No. 20/1949). The claimant alleges that if the agreement had been approved by the *Nationalrat*, he would have had a direct pecuniary claim against the Austrian Republic. As the Government neglected to submit the agreement to the *Nationalrat*, it had by this negligence caused him a pecuniary prejudice entitling him to reparation under the Federal Torts Law. Decision of the Vienna Landesgericht (Court of Appeals), May 20, 1953 (*Salzburger Nachrichten*, June 20, 1953), in favor of claimant; appeal to Supreme Court pending. This decision establishes in some respects a parallel to the impeachment procedure mentioned on p. 474 *supra*.

¹⁷¹ Cf. p. 454 *supra*, and Const. Court, March 9, 1948, Off. Coll. No. 1607: "The claimant is not entitled to lodge a complaint about the alleged violation of the Treaty of St. Germain. . . . The Const. Court is, moreover, incapable of taking this aspect into consideration under Art. 145 FC on its own initiative as the Federal Law announced in this provision has not yet been enacted."

¹⁷² According to Kelsen, 5 *op. cit.* 280, Art. 145 merely establishes sanctions for violations of the generally recognized rules of international law (Art. 9).

¹⁷³ Kunz, *loc. cit.* 323, seems to a certain extent doubtful whether the court should have this power. See, however, note 171 *supra*, Adamovich, *op. cit.* 44, and Hlavač, *op. cit.* 22.

¹⁷⁴ See note 171 *supra*.

CONCLUSIONS

Article 9 of the Constitution, according to which the generally recognized rules of international law are part of Austrian law, has been interpreted to the effect that "general" recognition need not necessarily be universal and that changes in these rules are automatically reflected in internal law. The rules, however, may be overridden by ordinary laws. This same attitude prevails in countries like France and The Netherlands, where international law embodied in *treaties* may no longer be abrogated by subsequent laws.

In respect to the abrogation of treaties, Austria, like Switzerland and the United States, adheres to the older view holding laws enacted in violation of prior treaty obligations internally valid, although constituting an international tort. However, if the ordinary law referred to in Article 145 of the Austrian Constitution were enacted, the Constitutional Court would very likely be able to declare null and void any law violating existing rules of international law, whether embodied in treaties or not.

Unlike in the United States, the Constitutional Court refuses to review the constitutionality of international agreements. This refusal has led the ordinary courts to assume this function under the pretext of deciding whether the agreement was duly published. The risk of international complications involved in the exercise of this right of review is, however, much reduced by the rule that even an unconstitutional international agreement remains internationally binding, although a nullity under internal law.

As in most other federal states the treaty-making power rests exclusively with the Federation, even in matters otherwise coming under the legislative competence of the *Länder*. This provision, in general, has been found to be satisfactory.

The same cannot be said, without some reservations, of the rules ensuring parliamentary control of the Executive's treaty-making power. The Austrian Constitution has tried to lay down explicitly which agreements may not be concluded as executive agreements. Although the solution—that any treaty involving or contemplating changes in existing legislation and any political treaty require parliamentary approval—is sound in theory, it has reduced Austria's bargaining power, especially in the field of economic relations, to such an extent that the strict rules of the Constitution had to be amended in this respect. On the other hand, the fact that treaties and laws are approved under the same parliamentary procedures facilitates Austria's adherence to international conventions laying down principles for internal legislation (for instance, the I.L.O. conventions).¹⁷⁵

To sum up, the Austrian Constitution may be described as following a middle course between the extreme monistic theory of the absolute supremacy of international law over internal law and the principle according to which, in internal law, the will of the people as expressed at any given moment by the majority of the *Nationalrat* should be supreme.

¹⁷⁵ See the list of the 21 I.L.O. conventions adhered to by Austria up to 1950 in BGBl. No. 219/1950.

COMPENSATION FOR NATIONALIZED PROPERTY: THE BRITISH PRACTICE

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INTRODUCTION

The United Kingdom, like the United States, tried after the last war to protect the interests of its citizens in the many Central and Eastern European countries in which first the means of production and not much later the means of distribution were "nationalized." Its success in these endeavors was about as disappointing as that of the United States. Neither the United Kingdom nor the United States succeeded in protecting in these countries the individual rights of their citizens by means of diplomatic intervention. The disintegration of the conception of property rights in Europe has gone so far that no individual claimant seems to have been able to obtain full satisfaction. Only where timely economic counter-measures were taken against the confiscating states could compensation agreements be concluded which provide for some measure of compensation.

The United Kingdom has so far concluded compensation agreements with Yugoslavia, Czechoslovakia and Poland, and negotiations with Hungary have, it is understood, been resumed.

The Yugoslav Agreement, dated December 23, 1948,¹ provides that the Government of Yugoslavia shall pay to the Government of the United Kingdom the sum of £4,500,000 sterling in full satisfaction and discharge of all claims of British nationals "arising on or before the date of signature of the present Agreement, out of various Yugoslav measures affecting British property" (Article II). According to Article IV, "British property" shall mean all property, rights and interests affected by various Yugoslav measures which on the date of the relevant measure were owed directly or indirectly, in whole or in part, by British nationals.

For the purposes of the agreement "British nationals" shall mean:

- (i) Physical persons who are British subjects or British protected persons belonging to any of the territories mentioned in sub-paragraph (i) of this paragraph, and their heirs and legal representatives; and
- (ii) Companies, firms and associations incorporated or constituted under the laws in force in the territory of the United Kingdom of Great Britain and Northern Ireland, or Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, India, Pakistan, Ceylon, or in any territory for the foreign relations of which the Government of any of the aforesaid countries is, at the date of signature of the present Agreement, responsible.

The United Kingdom thus concluded the Yugoslav Agreement not only in its own behalf but also on behalf of the governments of all the member

of the British Commonwealth. It will be seen that in the next agreement, namely that with Czechoslovakia, dated September 28, 1949,² the United Kingdom acted only on its own behalf, and the Dominions of Canada, Australia, New Zealand, the Union of South Africa, India, Pakistan and Ceylon have as yet, like the United States, not concluded any comparable agreement with Czechoslovakia.

A comparison between the United States and United Kingdom agreements with Yugoslavia reveals important differences which become still more marked when the United States Agreement with Yugoslavia and its application by the International Claims Commission (now Foreign Claims Settlement Commission) of the United States are compared with the Foreign Compensation (Yugoslavia) Order in Council, 1950,³ and its application by the Foreign Compensation Commission in London. But before discussing the Foreign Compensation Commission in London and its practice, it may be advisable briefly to summarize the United Kingdom-Czechoslovak Compensation Agreement of September 28, 1949, and the United Kingdom-Polish Agreement of November 11, 1954.

The Agreement with Czechoslovakia is based, as is the Yugoslav Agreement, on the principle of a "global settlement," and the Czechoslovak Government is to pay a sum of £8 million sterling in settlement of all claims of British nationals arising on or before the date of the signature of the agreement. This sum is to be paid in eighteen installments at intervals of six months beginning on September 15, 1950. If the British claim is in respect of property confiscated by the enemy during the occupation of Czechoslovakia and thereafter affected by one of the various restrictive Czechoslovak measures, such claim shall fall within the provisions of the agreement, notwithstanding the fact that the restitution of the property by the Czechoslovak authorities has not yet taken place, and the Czechoslovak authorities shall have the right to discontinue any proceedings that may have been initiated for restitution.

According to Article I of the United Kingdom Agreement with Poland,⁴ the Polish Government shall pay to the United Kingdom Government the sum of £5,465,000, of which the sum of £2,665,000 shall be "in full and final settlement of claims in respect of British property, rights and interests affected directly or indirectly prior to the date of the present Agreement by the Polish measures of nationalisation, expropriation and other similar measures, set out in the Schedule to the present Agreement, and regulations made under the aforesaid Polish measures."

Article 4 contains a definition of "British nationals" and of "British property" similar to the definitions of these terms in the earlier compensation agreements.

The question of the "relevant date," however, seems to be treated somewhat differently than in the earlier agreements because paragraph 2 of Article 4 provides that:

² Cmd. 7797.

³ Statutory Instruments, 1950, No. 1192.

⁴ H. M. Stationery Office, Cmd. 9343.

(2) In relation to claims in respect of measures of nationalisation, expropriation and other similar measures, the date on which the claim arose shall be deemed to be the date on which the relevant law or decree was published, except that, in the case of a claim arising out of measures based on the laws or decrees numbered 9, 11 and 12 of the Schedule to the present Agreement, the date on which the claim arose shall be deemed to be the date on which the relevant measure was applied to the property of a British national.

Decrees numbered 9, 11 and 12 of the Schedule are:

9. Decree of December 12, 1918, regarding compulsory State Administration (Law Journal of 1918, No. 21, Item 67).

11. Decree of April 26, 1949, regarding the acquisition and the transfer of real property for the realization of the National Economic Plans (Law Journal of 1952, No. 4, Item 31).

12. Law of July 20, 1950, regarding the registration of machines and the purchase of industrial machines not in use (Law Journal of 1950, No. 31, Item 285).

The agreement does not deal with the problem of any nationalized British assets situated in the former territory of the German Reich but now forming part of the administrative area of Poland. This particularly interesting question was considered in the case of United States assets in that area in the abortive discussions for a United States-Polish Compensation Agreement.⁵

THE FOREIGN COMPENSATION COMMISSION

On July 12, 1950, the Foreign Compensation Act⁶ received the Royal Assent. It provided for the establishment of a Commission for the purpose of registering and determining claims to participate in compensation under agreements with foreign governments and of distributing any compensation received under any such agreements.

On July 21, 1950, three Orders in Council under the Act were made. The Foreign Compensation (Yugoslavia) Order in Council 1950⁷ and the Foreign Compensation (Czechoslovakia) Order in Council 1950⁸ provided for the management and investment of any moneys received from the Yugoslav and Czechoslovak governments and for the disposal and distribution of the funds so received, and defined the persons qualified to make application and the conditions to be complied with by any applicant for establishing a claim.

The Foreign Compensation Act further provided in Section 4 (4) that "the determination of the Commission of any application made to them under this Act shall not be called in question in any court of law." Section 4 (2) of the Act provided further that the Commission should, with the approval of the Lord Chancellor, make rules as to the procedure of

⁵ See Dept. of State Bulletin, Jan. 5, 1947, p. 28.

⁶ 14. Geo. V, c. 12.

⁷ Statutory Instruments, 1950, No. 1192.

⁸ Statutory Instruments, 1950, No. 1191.

1. The Czechoslovak Order in Council applies only to persons who were citizens of the United Kingdom or Colonies (but not of the Dominions) on September 28, 1949.

2. For the purposes of the Czechoslovak Order in Council special provisions contained in Article 15 of the Order enable almost every applicant who was British on September 29, 1949, to comply with the requirements of the Order as to "relevant date."

A COMPARISON OF THE PRACTICE OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES AND THE FOREIGN COMPENSATION COMMISSION

Both under United States and United Kingdom legislation the determinations of the two Commissions are final and cannot be questioned in a court of law. But whereas the Foreign Claims Settlement Commission (further called "the Washington Commission") renders its decisions and the grounds thereof in writing, the Foreign Compensation Commission (further called "the London Commission") does not do so. The reason for this practice is the present state of "administrative law" in the United Kingdom and the possibility of challenging even "final" decisions of administrative tribunals in certain cases in the High Court.¹³

The main differences in the practice of the two Commissions seem to arise in the question of trusts and nominee holdings and in the question of the "relevant date," *i.e.*, the eligibility of claimants.

In British practice the nationality of the beneficiary does not matter, and if an application is made both by a trustee and a beneficiary, the Commission will entertain the application of the trustee in preference to that made by the beneficiary. In a paper on the "Nationalization of United Nations Property in Europe"¹⁴ it was submitted that "it would seem much more in accordance with precedent if both trustee and beneficiary should meet the requirements of Section 7 of the Order," *i.e.*, both be British nationals. A British company is qualified to claim compensation irrespective of the nationality of its shareholders.

The application of the rule that claims of trustees are admitted and preferred to those of beneficiaries creates difficult legal problems for the London Commission because the conception of a trust in the Anglo-Saxon meaning is not known in Yugoslavia or Czechoslovakia. It is difficult to give a reliable picture of the way in which the London Commission is overcoming this particular problem of the English trustee of Continental assets, as the reasons for their decisions are not published. It is left to the anticipated review of all cases which until now have been only provisionally determined to ensure uniformity of decisions.

It is in this question of trustees as claimants that points of contact may arise between the London and Washington Commissions. If certain bene-

¹³ See *Rex v. Northumberland Compensation Appeal Tribunal ex parte Shaw*, [1951] 1 K.B. 711.

¹⁴ See 36 *Grotius Society Transactions* 75-114 (1951).

ficiaries of English trusts are United States citizens it is conceivable that they could claim compensation twice: once in the name of the trust before the London Commission and as individual beneficiaries before the Washington Commission. Seymour J. Rubin, in his excellent study, "Nationalization and Compensation—A Comparative Approach,"¹⁵ has already pointed out that not only in the question of trustee and beneficiary but also in the question of corporate eligibility, difficulties could arise because the United States' practice insists on at least 20% United States beneficial interest in a corporation before entering its claim, whereas the British practice regards a British company entitled to compensation irrespective of who its shareholders are. Rubin rightly foresaw a situation which, arising out of the different theories as to corporate eligibility, "may in the future be the source of substantial complications" (*loc. cit.*, p. 469).

The main difference between American and British practice exists in the question of "eligible claimants."¹⁶ The Washington Commission held in the *Matter of the Claim of Angelina Evasovich Pobrica* on June 25, 1953,¹⁷ that

the mere enactment of a law under which property may later be nationalized does not create a claim under the Yugoslav Claims Agreement of 1948. We hold that a claim for the nationalization or other taking of property does not arise until the possession of the owner is interfered with.

The Washington Commission thus was not satisfied with the mere fact that the property in question was subject to the Yugoslav Nationalization Act of April 28, 1948. It insisted on proof that this Act had already been applied in this particular case. The British Orders in Council, particularly the Czechoslovak Order in Council, seem much more favorable to *naturalized* subjects than the corresponding American rules and decisions, and the question of "eligibility" is arising mostly in cases of naturalized subjects. Article 15 of the Czechoslovak Order in Council provides, for example, that the "relevant date" shall, at the option of the applicant be:

(a) the date of entry into force or the date of publication in the Czechoslovak Official Gazette, whichever is the later, of the Czechoslovak or Slovak law or decree by or under which the property or interest in property was affected or

(b) the date on which the person making the application or his predecessors in title, was deprived of title to or enjoyment of the property to which his claim relates or, if the claim relates to an interest in property, the date on which the corporation, which owned or held the property, was deprived of title to or enjoyment of that property or

(c) the twenty-eighth day of September, 1949, if the person making the application, or his predecessor in title was deprived of the enjoyment of the property to which his claim relates, or, in the case of a claim relating to an interest in property, the corporation which owned

¹⁵ University of Chicago Law Review, 1949-1950, pp. 460-477.

¹⁶ See Rode, 47 A. J. I. L. 623 *et seq.* (1953).

¹⁷ *Ibid.* 629.

or held the property was deprived of the enjoyment of that property, as a result of the property being placed under national administration under Czechoslovak Decree No. 5 of 1945 or Slovak Decree No. 50 of 1945.

These provisions are wider than the corresponding provisions in the Yugoslav Order in Council. American practice, which Rode¹⁸ describes as "strict in the interpretation of the citizenship requirements," excludes a great number of claimants who would be eligible under the British Orders in Council. American practice, which certainly conforms with the general proposition that the nationalization of the property of a person who is not a citizen of the United States at the time of such taking does not constitute an injury to the United States, does not, it is submitted, take sufficiently into account that it is in most cases impossible to determine the exact moment of "nationalization or other taking." The British Orders in Council have therefore, in order to prevent injustice, given the applicant an option to choose between different dates on which his title to or enjoyment of the property was infringed, such date, however, never extending beyond the date of the respective Compensation Agreement.

In another respect also the Washington and London practices differ. Whereas the Washington Commission disallowed¹⁹ "transfers claimed to have been made in this country by deeds not recorded in Yugoslavia, transfers made during the occupation or after the war without having been recorded and transactions attempting to give beneficial ownership of real property to claimants," the London Commission has, at any rate in its provisional determinations, taken a less strict view. In a number of cases claims were made on the strength of assignments of property executed in the United Kingdom but not recorded in Czechoslovakia or Yugoslavia, and were admitted by the Commission. In this instance the Washington practice seems to take much more account of the local (Yugoslav) laws than the London Commission which, although always asking for proof of the relevant Yugoslav or Czechoslovak law, has considerable latitude in the provisions of the Orders in Council to admit claims even if provisions of Yugoslav or Czech law seem to point in another direction. In the Czechoslovak Order in Council, for example, we find Articles 17 and 18 which provide:

17. If any transfer of property, or of any interest in property, to which a claim relates was effected in a part of Czechoslovakia under Hungarian occupation between the sixth day of November, 1938 and the ninth day of May 1945 or under German occupation between the first day of October, 1938 and the ninth day of May, 1945, that transfer shall be deemed, for the purposes of this Order, to have been null and void if it was effected under fraud or duress or without the consent of the person to whom the property belonged at the date of such transfer.

18. (a) No application under this Order shall be dismissed by the Commission solely on the ground that restitution proceedings in

¹⁸ *Ibid.* 625.

¹⁹ *Ibid.* 628.

Czechoslovakia with respect to the property or interest in property to which the claim relates have not been instituted or, if they have been instituted, have not been prosecuted to a successful conclusion.

The Order in Council thus expressly provides that Czechoslovak law may be disregarded and substitutes its own rules as to the invalidity of transfers of property on Czechoslovak territory between 1938 and 1945. This is a rather unique case of English legislation, as it purports to determine the validity of certain transactions relating to foreign-situated property irrespective of the local law.

But the bold and unconventional approach of the British Orders in Council has justified itself. It enables the London Commission to do justice in all cases coming under the lump-sum compensation agreements which have so far been concluded. The amount which every claimant will receive will, however, be only a fraction of the amount awarded. The Yugoslav Government undertook to pay in full settlement £4,500,000, and one of the Annual Reports of the London Commission discloses that the total amount of Yugoslav claims amounted to £25,556,800. This compares with \$17,000,000 paid by Yugoslavia to the United States and about \$150,000,000 claimed by United States claimants.²⁰

In the case of the Agreement of the United Kingdom with Czechoslovakia the sum to be paid by Czechoslovakia is £8,000,000, whereas the amount of claims exceeded £100,000,000. According to the latest Report of the London Commission for the financial year ended March 31, 1954, provisional awards against the Yugoslav Fund totaled about £11,733,516, and against the Czechoslovak Fund about £34,750,695. Claims still awaiting determination amounted to about £18,176,726 in the case of claims against the Yugoslav Fund, and about £57,994,545 in the case of claims against the Czechoslovak Fund.

These figures confirm what has been said at the beginning of this paper about the unsatisfactory nature of all lump-sum agreements. They provide only a very limited remedy for United States and British citizens affected by the confiscatory measures of Yugoslavia and Czechoslovakia. The comparatively even smaller amount of £2,665,000 to be paid now by Poland to United Kingdom claimants shows that these "lump-sum" settlements are becoming even more unsatisfactory, although they may well be the maximum obtainable in present circumstances.

By virtue of section 3 of the Foreign Compensation Act²¹ three Orders in Council have been published, namely, The Foreign Compensation (Hungary) (Registration) Order, 1954, The Foreign Compensation (Roumania) (Registration) Order, 1954, and The Foreign Compensation (Bulgaria) (Registration) Order, 1954,²² the purpose of which is to register claims arising out of the nationalization of British property in Hungary, Bulgaria and Rumania with the Foreign Compensation Commission, which is to report upon them. Such report will no doubt be of great value to the United Kingdom representatives in their discussions for compensation with

²⁰ *Ibid.* 622.

²¹ 14 Geo. 6, c. 12.

²² Statutory Instruments, 1954, Nos. 219, 220, 221.

the various governments, as it will enable them to present a closely examined and verified statement as to British claims against the countries concerned. The previous practice of presenting merely general estimates as to British claims on the basis of insufficient information proved no doubt detrimental to British interests, as is shown by the low dividends which are expected in the Czechoslovak and Yugoslav cases. The new British practice of registering and *examining* claims as a preliminary step to negotiations for lump-sum settlements should be adopted generally.

THE SUEZ CANAL BASE AGREEMENT OF 1954

ITS BACKGROUND AND IMPLICATIONS

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The agreement between the United Kingdom and Egypt signed at Cairo on October 19, 1954,¹ replaces the Anglo-Egyptian Treaty of August 26, 1936,² which is thereby terminated. The earlier treaty provided for the establishment of a complex of military installations and supporting facilities along the Suez Canal, and its garrisoning by British troops. The 1954 agreement provides for the gradual evacuation of this garrison from the Suez Canal base, as these installations generally are known, by June 18, 1956. During the twenty-month evacuation period (October 19, 1954–June 18, 1956) the Egyptian military forces will assume gradual control of the base, and custody of designated base installations. Other designated installations will be maintained in a state of readiness until October 18, 1961, by civilian technicians in the employ of one or more British or Egyptian firms under contract with the British Government. The agreement, unless both parties agree upon an extension, is to terminate seven years from the signing thereof. During its seven years' duration the United Kingdom has the right to re-enter the base with its military forces in order to put the base on a war footing, provided an attack is made by an "outside Power"³ upon a state which is a member of the Arab Collective Security Pact⁴ or Turkey. Upon the completion of evacuation, the Egyptian armed

* The views expressed herein are the personal views of the author.

¹ For text, see Agreement between the Government of the United Kingdom and Northern Ireland and the Egyptian Government regarding the Suez Canal Base, October 19, 1954, Cmd. 9298 (London, 1954); also in 10 *Revue Egyptienne de Droit International* 297–352 (1954). The text in the *Revue* contains an annex to Note 7(b), which fails to appear in the Command Paper.

The agreement is effective as though it had entered into force on the date of signature; ratifications were exchanged at Cairo on Dec. 6, 1954. *New York Times*, Dec. 7, 1954, p. 3.

The term "agreement" was preferred to the term "treaty" by the Egyptian Government. Prime Minister 'Abd al-Nāsir has explained this preference by pointing out that the word "treaty" is anathema to the Egyptian people, since "they think it means chains that tie them." *U. S. News and World Report*, Sept. 3, 1954, p. 29.

² For text, see 31 *A.J.I.L. Supp.* 77–100 (1937). Ratifications were exchanged at Cairo on Dec. 22, 1936.

³ By an agreed minute attached to the agreement, Israel is expressly excluded from the definition "outside Power."

⁴ The Treaty of Joint Defense and Economic Co-operation between the States of the Arab League, better known as the Arab Collective Security Pact, was signed at Cairo on April 13, 1950. All signatories, *i.e.*, Egypt, Iraq, Jordan, Saudi Arabia, Syria, Lebanon, and Yemen, have ratified, and the treaty entered into force in April, 1952. Libya, which adhered to the Pact of the Arab League of March 22, 1945, on March 28,

forces will be charged with full responsibility for the defense of the Canal, a responsibility which, under the 1936 treaty, they shared with the British garrison.

The new agreement represents for the present Egyptian Government the achievement of a goal sought unsuccessfully by a number of its predecessors—the freeing of Egypt from the presence of foreign troops for the first time since 1882.⁵ It represents for the British Government a recognition, as Sir Anthony Eden has expressed it, that “defense arrangements must be based on the consent and cooperation of the peoples concerned.”⁶ However, while satisfying an aspiration of Egyptian nationalism, and at the same time making possible British assistance in the defense of the Canal for a limited period of time and under certain defined circumstances, the conclusion of the agreement has affected, or may in future affect, certain basic problems of the area. Some of these problems will be adverted to later in this paper, after the background of the Suez Canal and of the Canal base has been discussed, and the 1954 agreement analyzed.

The Suez Canal⁷ was opened for the general use of the world's shipping on November 17, 1869, by the *Compagnie Universelle du Canal Maritime de Suez*, a company organized largely through the efforts of the Frenchman, Ferdinand de Lesseps.⁸ The company operates by virtue of a con-

1953, had not yet adhered to the Collective Security Pact in June, 1955. The general purpose of the Arab League Pact is the advancement of the collective interests of the Arab states; of the Security Pact, to further the objectives of the Arab League Pact, especially with respect to mutual assistance in the event of aggression by a non-Arab state, in accordance with the provisions of Art. 51 of the U.N. Charter dealing with “the inherent right of individual or collective self-defense.” See B. Y. Boutros-Ghali, “The Arab League, 1945-55,” *International Conciliation*, No. 498 (May, 1954, but written and published in the spring of 1955); and Majid Khadduri, “The Arab League as a Regional Arrangement,” 40 *A.J.I.L.* 756-777 (1946). For text of Arab League Pact, see 39 *A.J.I.L. Supp.* 266-272 (1945); for text of Arab Collective Security Pact, see 49 *ibid.* 51-54 (1955).

⁵ See Majid Khadduri, “The Anglo-Egyptian Controversy,” 24 *Proceedings of the Academy of Political Science* 82-99 (1952). When evacuation is completed on June 18, 1956, it will have been accomplished just three weeks short of seventy-four years after the first entry of British forces on July 10, 1882. *New York Times*, Oct. 20, 1954, pp. 1, 9.

⁶ *Beirut Daily Star*, July 29, 1954, p. 1.

⁷ See C. H. Hallberg, *The Suez Canal* (N. Y., 1931); Sir Arnold Wilson, *The Suez Canal* (London, 1939); Andre Siegfried, *Suez and Panama* (London, 1940); H. J. Schonfield, *The Suez Canal in World Affairs* (London, 1952); John Marlowe, *Anglo-Egyptian Relations, 1800-1953* (London, 1954); and H. L. Hoskins, “The Suez Canal as an International Waterway,” 37 *A.J.I.L.* 373-385 (1943).

⁸ The status of the Canal Company is unusual. It is registered under Egyptian law as an Egyptian company, but is incorporated as a *société anonyme* or joint stock company and governed by the provisions of the French code respecting such companies. The Court of Appeal in Paris is designated as the tribunal of ultimate resort in legal matters affecting the company. The company's registered office (*siège*) is in Alexandria, while its administrative head office (*domicile administratif*) is in Paris. See *The Suez Canal, Notes and Statistics*, by the *Compagnie Universelle du Canal Maritime de Suez* (London, 1952), especially at p. 23 *et seq.*; H. L. Hoskins, *The Middle East* 41-56 (N. Y., 1954); and Great Britain and Egypt, 1914-1951, *Royal Institute of Inter-*

cession from the Egyptian Government,⁹ as ratified in 1866 by the then suzerain of Egypt, the Sultan of the Ottoman (Turkish) Empire.¹⁰ The Acts of Concession are valid for 99 years from the date of the opening of the Canal; if Egypt fails to renew the concession in 1968, the question of compensation is to be settled by negotiation between the Egyptian Government and the Company.¹¹

The United Kingdom Government, which originally had opposed the construction of the Canal, soon came to recognize its value as the shortest and most convenient route to British areas of interest in the East, and its strategic importance as a link with these areas. Late in 1875 rumors reached the attention of British Prime Minister Disraeli that the ruler of Egypt, being in urgent need of funds, was seeking to sell his shares in the Canal Company. Disraeli, acting on this information, was able to purchase these shares for his government. They amounted to approximately 44 percent of the company's total shares, and thus the purchase secured for Britain an important voice in the administration of the company.

A second British move obtained for the United Kingdom a political

national Affairs, Information Papers No. 19 (London, 1952), pp. 202-203. Under French law a *société anonyme* is a business association in which the liability of the shareholders is limited. Important company decisions on policy and finance are made in Paris. In the spring of 1955 sixteen of the company's directors were French, nine British, five Egyptian, one Dutch, and one American (U. S.). Egypt is progressively securing greater representation on the Board of Directors, and a larger share in the company's profits. Gradually a higher proportion of the company's personnel is coming to be Egyptian. See article on the Suez Canal Company in Wall Street Journal, April 27, 1955, pp. 1, 6.

⁹ For the text of the concession agreements of Nov. 30, 1854, and Jan. 5, 1856, see 55 British and Foreign State Papers (1864-65), 970-973, 976-981. For the statutes of the company, signed at Alexandria on Jan. 5, 1856, see *ibid.* 981-995. The final terms of the concession are incorporated in the contract of Feb. 22, 1866, between the Egyptian Government and the company, 56 *ibid.* 277-283 (1865-66).

¹⁰ The Sultan authorized the execution of the contract by a *firman* (decree) of March 19, 1866, 56 British and Foreign State Papers 293-294 (1865-66). Although Egypt had been virtually independent of the Ottoman Empire since 1806, it remained under nominal Turkish suzerainty until 1914.

¹¹ Great Britain and Egypt, *op. cit.*, note 8 *supra*, p. 202. The article in the Wall Street Journal, cited note 8 *supra*, commenting on what will happen if Egypt fails to renew the Acts of Concession in 1968, states that "politically the question is whether the Egyptians will follow the company's principles of permitting free and equal passage to the ships of all nations at reasonable tolls." It might be pointed out that the Constantinople Convention of 1888 (see 3 Moore's Digest 264-266) provides that the parties agree that the engagements resulting from the convention shall not be limited by the duration of the Acts of Concession (Art. XIV); that the Canal shall always be free and open to all vessels, without distinction of flag (Art. I); and that the principle of equality as regards the free use of the Canal forms one of the bases of the convention (Art. XII).

In 1908, when the concession still had 60 years to run, it was proposed to extend its duration until Dec. 31, 2008, on terms very favorable to Egypt. Public opinion in Egypt was opposed to this proposal, considering that the prolongation of the concession meant the prolongation of foreign—and particularly British—interference in Egypt's internal affairs. The Egyptian General Assembly rejected the proposal by all but one vote in April, 1910. Schonfield, *op. cit.* 65.

advantage in Egypt. In 1882, at the request of the Khedive (Viceroy) of Egypt,¹² Britain intervened militarily to suppress an Egyptian Army revolt. A British occupation force remained in the country, and Britain secured its "special position" in Egypt, which became a virtual British protectorate, although the Turkish Sultan remained the Viceroy's nominal suzerain until 1914.¹³

Shortly after the British occupation of Egypt the maritime Powers sought the establishment of an international regime to govern the status and use of the Canal. Britain signified its willingness to enter into such an arrangement, and on October 29, 1888, the Constantinople Convention was signed by the United Kingdom, Germany, Austria-Hungary, France, Italy, The Netherlands, Russia, Spain, and Turkey.¹⁴ On signing, however, Britain reserved the right to utilize the Canal to guard its position in Egypt as long as the occupation continued. France, which at first refused ratification because of this reservation, eventually accepted the British position,¹⁵ and by the Anglo-French Declaration of April 8, 1904, respecting Egypt and Morocco, France recognized Britain's sphere of influence in Egypt in return for British recognition of France's sphere of influence in Morocco.¹⁶ The convention then entered into force, and remains to this day a basic instrument governing the use of the Canal.

The 1888 convention provides that the Canal shall always remain open, both in time of peace and of war, to all commercial and war vessels, without distinction of flag, and including the ships of belligerents. No hostile act or act of interference with its free use may be committed in the Canal itself, its ports of access, or within a three-mile radius of such ports, by any state, even the territorial sovereign when it is at war.¹⁷ Egypt is charged with taking measures to secure the execution of the convention; the convention recognizes the right of Egypt and Turkey to take measures consistent with its provisions to secure by their forces the defense of Egypt and the maintenance of public order,¹⁸ provided such measures "shall not

¹² *Ibid.* 51.

¹³ By the Treaty of Lausanne of July 23, 1923, Turkey renounced all its rights in Egypt retroactively to Nov. 5, 1914. See 117 British and Foreign State Papers 543-591, 549 (1923). On the legal status of the Canal under Turkey and Great Britain, see Vernon A. O'Rourke, *The Juristic Status of Egypt and the Sudan* (Baltimore, 1935); on problems of suzerainty and protectorate, see Charles H. Alexandrowicz-Alexander, "The Legal Position of Tibet," 48 A.J.I.L. 265-274 (1954).

¹⁴ For text, see 3 Moore's Digest 264-266; 3 A.J.I.L. Supp. 123 (1909).

¹⁵ C. John Colombos, *The International Law of the Sea* 152-153 (3rd rev. ed. London, 1954).

¹⁶ 97 British and Foreign State Papers 39-41 (1903-1904); 2 Hackworth's Digest 816; O'Rourke, *op. cit.* 35-36. According to a British information paper, Britain's "special position" in Egypt was given official recognition by the great Powers through the Anglo-French agreement of 1904 and similar declarations by Austria-Hungary, Germany, and Italy. See Great Britain and Egypt, *op. cit.* note 8 *supra*, p. 2.

¹⁷ Arts. I and IV.

¹⁸ Arts. IX and X. By Art. IX Egypt may call on Turkey to assist in insuring the execution of the treaty; by Art. X Turkey may assist Egypt in the defense of Egypt. After World War I the Central Powers signatory of the 1888 convention agreed to the transfer of Turkey's special rights in Egypt to the United Kingdom. This was done

interfere with the free use of the Canal.”¹⁹ The convention further provides that “with the exception of obligations expressly provided by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive . . . are in no way affected.”²⁰

By virtue of the Constantinople Convention the Canal clearly is subject to an international regime, although its status appears to fall short of neutralization, since the convention provides that it is open to warships, even in wartime.²¹ During World War I the passage of shipping through the Canal continued on the principle of “business as usual,” with minor interruptions. The 1888 convention was adhered to in spirit, although not in the letter, for the defense of the Canal from sabotage was a primary consideration of the British protecting authority, which acted accordingly.²² At the end of the war Britain took steps to strengthen its legal position to protect the Canal by requiring the “enemy” Powers to consent to the substitution in the convention of the name of the United Kingdom for that of the Ottoman Empire.²³ During World War II the strategic value of the Canal was given primary consideration, and both sides, according to Schonfield, “were fully prepared to put the Canal out of action if it assisted their cause.”²⁴

After Turkey had entered World War I on the side of the Central Powers, Great Britain, on December 18, 1914, declared the abolition of Turkish suzerainty and the establishment of a British protectorate over Egypt, an act later ratified by Turkey.²⁵ On February 28, 1922, however, partly in response to growing nationalist pressures in Egypt, Britain declared the protectorate ended and Egypt to be an independent sovereign state. Nevertheless, the British declaration reserved certain matters to the discretion of the British Government until such time as the two countries could conclude agreements respecting them. Among these matters were the security of the communications of the British Empire in Egypt, *i.e.*, the Suez Canal, and the defense of Egypt against all foreign aggression or interference, direct or indirect.²⁶ O'Rourke has pointed out that

by Germany through Art. 152 of the Treaty of Versailles; by Austria through Art. 107 of the Treaty of St. Germain; by Hungary through Art. 91 of the Treaty of Trianon; and Turkey through Art. 109 of the Treaty of Sèvres and Art. 99 of the Treaty of Lausanne. 2 Hackworth's Digest 816-817. ¹⁹ Art. XI.

²⁰ Art. XIII.

²¹ John Bassett Moore categorically states that the 1888 convention does not neutralize the Canal, pointing out that if it were neutralized it would be closed to the ships of belligerents. 3 Moore's Digest 267. Columbus, *op. cit.* 153, and Hoskins, 37 A.J.I.L. 376 (1943) agree. But *cf.* Judge Schücking in his dissenting opinion in the Wimbledon case, P.C.I.J., Series A, No. 1, 1 Hudson's World Court Reports 187 (1922-26), and L. Oppenheim, *International Law* (7th ed., by H. Lauterpacht), Vol. II (London, 1952), p. 245.

²² Schonfield, *op. cit.* 72.

²³ *Ibid.* 73-74; see note 18 *supra*.

²⁴ *Ibid.* 111.

²⁵ 108 British and Foreign State Papers 185 (1914-Part II); see notes 13 and 18 *supra*.

²⁶ 116 British and Foreign State Papers 84-85 (1922); 2 Hackworth's Digest 817-818.

"Egypt's international status . . . after the declaration of 1922 was not equivalent to full independence";²⁷ certain aspects of the protectorate continued.²⁸

The tensions which led ultimately to World War II, and particularly the Italo-Ethiopian conflict, forced an issue which had been pending for fifty-three years, the regulation by treaty of Britain's "special position" in Egypt.²⁹ The Treaty of Alliance between the United Kingdom and Egypt of August 26, 1936,³⁰ formally terminated the British occupation of Egypt, and provided for the exchange of ambassadors instead of high commissioners between the two countries. However, it gave Great Britain the right to establish in the Suez Canal area bases garrisoned by its military forces. Article VII provided, *inter alia*, that Egypt was obligated in the event of war to furnish Britain facilities and assistance, including the use of ports, airfields, and means of communications. Article VIII expressly recognized the Suez Canal to be an integral part of Egypt, but stated that it was also a universal means of communication as well as an essential communication between parts of the British Empire; it provided that until such time as the parties could agree that the Egyptian Army was capable of the sole defense of the Canal and of its navigation, British forces would be stationed along the waterway, in a zone specified in the Annex to Article VIII, to co-operate with Egyptian forces in its defense.³¹ Article VIII averred that the presence of British forces in the limited Canal Zone area (previously British troops had been stationed in various parts of Egypt, including Cairo and Alexandria) was neither an occupation of the country nor prejudicial to its sovereign rights. Article XVI provided for treaty revision at the request of either party at the end of a twenty-year period from the date of the treaty's entry into force; if the parties could not agree on revision, the matter was to be submitted to the League of Nations or to an arbitral body selected by the parties. It further provided that if both parties agreed, revision could be undertaken after a ten-year period; in any event, revision was to ensure the continuance of the Anglo-Egyptian alliance.

An upsurge of Egyptian nationalism after World War II led to an unsuccessful attempt by the Egyptian Government to secure the termination of the 1936 treaty. The Egyptians were not only irked at an occupation of Egyptian territory by foreign troops, but also by the fact that the number of forces retained in the Canal base after the war considerably exceeded the number provided for in the Annex to Article VIII of the treaty.³² In 1946 Britain and Egypt reached substantial agreement with

²⁷ *Op. cit.* 107.

²⁸ Schonfield, *op. cit.* 75.

²⁹ Survey of International Affairs, 1936, ed. by A. J. Toynbee (London, 1937), p. 672.

³⁰ Note 2 *supra*. See Great Britain and Egypt, *op. cit.* 33-56.

³¹ The Annex provided in par. 1: "Without prejudice to the provisions of Article 7, the number of the forces of His Majesty The King and Emperor to be maintained in the vicinity of the Canal shall not exceed, of the land forces, 10,000, and of the air forces, 400 pilots, together with the necessary ancillary personnel for administrative and technical duties. These numbers do not include civilian personnel, e.g., clerks, artisans and laborers."

³² Note 31 *supra*.

respect to evacuation of British troops by September 1, 1949; inability to agree on other issues, however, especially that of the future status of the Anglo-Egyptian Sudan, resulted in the failure of this effort.³³ On July 8, 1947, Egypt placed the matter before the United Nations Security Council, but no solution was forthcoming.³⁴ By 1948 the possibility of another war motivated British policy more strongly than ever to try to retain an installation regarded as vital to the defense of the Middle East, and which has been described as the "only existing base complex from which forces could be deployed and supplied against an invader from the north," as "a giant imperial department store," and as "the world's largest military depot."³⁵

Anglo-Egyptian negotiations with respect to the base were begun in December, 1950, and continued into the fall of 1951.³⁶ During the summer of 1951 the United States, United Kingdom, France, and Turkey agreed to participate in a plan for the defense of the Middle East.³⁷ When British Foreign Secretary Herbert Morrison alluded in the House of Commons to Egypt's vital rôle in the defense of that area, however, prior to inviting Egypt to participate in the defense plan, he was rebuffed when the Egyptian Foreign Minister told the Chamber of Deputies that the ever-present possibility of great-Power rivalries flaring up into a world war was no justification for asking Egypt to "tolerate indefinitely an occupation violating our sovereignty and independence."³⁸ On October 8, 1951, the Egyptian Prime Minister introduced legislation to denounce the 1936 treaty; it was enacted by the Egyptian Parliament on October 15, two days after the four Powers had delivered to Egypt their proposals on Middle East defense, at the same time inviting Egypt to join in the defense plan.³⁹ The British Government informed the Egyptian Government that since the 1936 treaty contained no provision for unilateral denunciation, it regarded the treaty as continuing in force, but was willing to discuss revision.⁴⁰

Anglo-Egyptian relations continued to deteriorate. British troops of the Canal base garrison were harassed, and on January 26, 1952, well-

³³ The Sidqi-Bevin Protocol; see George Kirk, *A Short History of the Middle East* 226-231 (Wash., D. C., 1949).

³⁴ See Herbert W. Briggs, "*Rebus Sic Stantibus* Before the Security Council: The Anglo-Egyptian Question," 43 A.J.I.L. 762-769 (1949).

³⁵ See New York Times, *News of the Week in Review*, Dec. 14, 1952, p. 4; and Time Magazine, Aug. 10, 1953.

³⁶ See "Anglo-Egyptian Conversations on the Defense of the Suez Canal and on the Sudan, Dec. 1950-Nov. 1951," Cmd. 8419 (London, 1951), commonly referred to as the "British White Paper," and "Records of Conversations, Notes and Papers Exchanged between the Royal Egyptian Government and the United Kingdom Government, March 1950-Nov. 1951," (Cairo, 1951), commonly referred to as the "Egyptian Green Paper."

³⁷ Marlowe, *op. cit.* 385.

³⁸ Documents on International Affairs, 1951, ed. by Stephen Heald and John W. Wheeler-Bennett (London, 1952), pp. 455-461; Great Britain and Egypt, *op. cit.* 143-144.

³⁹ British White Paper, *op. cit.* note 36 *supra*, 43-45.

⁴⁰ *Ibid.* 46-47; Great Britain and Egypt, *op. cit.* 147-151.

organized extremist elements in Cairo staged anti-Western demonstrations, which resulted in some loss of life and considerable property damage. Apparently the rioting was in retaliation for the incident of the preceding day at Ismailia in the Canal Zone, when over 40 Egyptian auxiliary police were killed in a skirmish with British troops. Martial law was invoked; the Army restored order; and the Wafdist government of Mustafa al-Nahhas was dismissed by King Farūq, who ruled during the following months through successive cabinets of independent politicians.⁴¹ During March through May exploratory talks were held regarding the disposition of the base. Since the Sudan question, which seemed insoluble, was coupled with the base question, no agreement could be reached.⁴²

On July 23, 1952, an event occurred which drastically changed the Egyptian political scene. On that day a successful coup by the Egyptian military forces brought to power the present Government of Egypt, a military junta calling itself the Revolutionary Command Council (RCC), headed by Lt. Col. Gamal 'Abd al-Nāsir, and for a time under the ostensible leadership of Maj. Gen. Muhammad Nagīb. King Farūq was ousted, and Egypt ultimately was declared a republic on June 18, 1953.⁴³

The conclusion of the agreement of February 12, 1953, between the United Kingdom and Egypt with respect to the future status of the Sudan⁴⁴ opened the way for further negotiations regarding the Canal base.⁴⁵ Talks between the two governments began in late April, but were broken off on May 6; they were resumed in late August; continued in late September; but a new deadlock developed in October.⁴⁶ Meanwhile the high degree of tension continued to cause incidents, including attacks on British soldiers.⁴⁷ Opposition to withdrawal of British troops and to further talks with Egypt developed from a group of Conservative Members of Parliament led by Captain Charles Waterhouse.⁴⁸ The United States, however, used its good offices in an effort to bring about a compromise solution of the base question. After several offers and counter-offers earlier in the year, informal talks were resumed on July 10, 1954,⁴⁹ and a compromise was worked out which enabled the preliminary "Heads of Agreement" to be initialed on July 27, 1954.⁵⁰

By virtue of the compromise, Britain gave up its insistence on a long-term agreement of ten to twenty years' duration regarding reactivation of

⁴¹ Marlowe, *op. cit.* 383.

⁴² See New York Times, March 2, 16, 28, and 30, and May 11, 1952; London Economist, May 17, 1952.

⁴³ See Mohammed Neguib (Muhammad Nagīb), *Egypt's Destiny* (London, 1955). General Nagīb's resignation as President of Egypt was accepted in early November, 1954.

⁴⁴ See Hoskins, *The Middle East* 95-97.

⁴⁵ New York Times, Feb. 13, 1953, p. 5; *ibid.*, editorial, Feb. 28, 1953.

⁴⁶ *Ibid.*, April 29, May 7, Sept. 5, 21, 29, Oct. 6 and 22, 1953.

⁴⁷ *Ibid.*, May 14, July 15, Aug. 13, and Nov. 25, 1953, and March 20, 1954.

⁴⁸ *Ibid.*, Dec. 16, 1953.

⁴⁹ *Ibid.*, July 11, 1954.

⁵⁰ *Ibid.*, July 28, 1954, p. 1. The term "Heads of Agreement" refers to a preliminary agreement on basic principles, leaving details and technicalities to be worked out through further negotiations. For text, see Cmd. 9230, *Egypt No. 1* (1954); New York Times, July 28, 1954, p. 2; 8 *Middle East Journal* 460 (1954); and 10 *Revue Egyptienne de Droit International* 141-142 (1954).

the base, and withdrew its demand that an attack on Iran should be made an occasion for such reactivation. Britain accepted seven years as the duration of the agreement, a period of time agreed upon earlier during the abortive negotiations held in the fall of 1953. The failure to include Iran in the reactivation provision was partially compensated for by Egypt's agreement to a commitment that the parties would engage in "immediate consultation" in the event that any state covered by the agreement came under a "threat of an armed attack." Apparently it was the thought of the British that an attack on Iran would constitute a threat toward Iraq, and thus the consultation provision appropriately could be invoked.⁵¹ Britain accepted a twenty instead of a twenty-four-month period for the completion of evacuation, and earlier had agreed that the base maintenance personnel should be civilian technicians rather than military personnel in uniform.

Egypt's part of the compromise consisted in consenting to a seven-year agreement instead of insisting upon the termination of the 1936 treaty either at once or in 1956; in allowing Turkey, a non-Arab state, to be included in the reactivation provision; and in accepting the provision that evacuation should be completed in twenty months instead of the fifteen months agreed upon tentatively during the abortive negotiations of the fall of 1953.

The final agreement was signed on October 19, 1954; ratifications were exchanged at Cairo on December 6, 1954;⁵² and the agreement became effective as though it had entered into force on the date of signature. It consists of the main agreement of thirteen articles; two lengthy annexes, including appendices; seventeen exchanges of notes elaborating the provisions of the main agreement, to several of which are appended annexes, and to one, an appendix; and one agreed minute interpreting certain articles of the main agreement. The curious structure of the agreement apparently was necessitated by the number and complexity of the technical problems to be disposed of in detail. Thus the essential provisions are set forth in the main agreement, while detailed plans for withdrawal of troops and organization of the base are elaborated in the annexes, and various legal, financial, and other useful arrangements in implementation of, necessitated by, or arising out of the agreement are dealt with through exchanges of notes. Article 11 of the main agreement provides that the annexes and appendices to the agreement are an integral part thereof; each exchange of notes constitutes a subsidiary agreement.

Article 2 of the main agreement declares the termination of the treaty of August 26, 1936, without specifying the time of termination. This formula was devised to avoid raising the issue of Egypt's unilateral abrogation thereof on October 15, 1951, which was not recognized by Great Britain.

Article 1 of the main agreement provides for the withdrawal of British forces from Egyptian territory in gradual stages, in accordance with the schedule set forth in Part A of Annex I. This withdrawal is to be com-

⁵¹ See comment on signing of agreement in *New York Times*, Oct. 20, 1954, p. 9.

⁵² *Ibid.*, Dec. 7, 1954, p. 3.

pleted entirely within twenty months of the date of signature and has been proceeding ahead of schedule.⁵³ Other portions of Annex I contain detailed provisions for the progressive transfer of responsibility for security and maintenance of installations from British to Egyptian control.⁵⁴

Article 3 of the agreement provides that certain parts of the Canal base shall be kept in efficient working order and capable of immediate use in case the need for reactivation of the base should arise. In Annex II and Appendices thereto, it is provided that Great Britain will maintain and operate certain installations for the duration of the agreement, whereas Egypt "shall maintain in good order" other specified installations. The transfer to Egypt within the twenty-month withdrawal period of ownership and possession of listed installations and equipment comprises all air fields in the Suez Canal base area occupied by British forces; Navy House, Port Said, which is not a part of the base; Adabiya Port,⁵⁵ including heavy cranes; Royal Naval Boom Depot, Adabiya; the Delta W. T. Station; Moascar (although a part of this area will be dedicated to the rent-free accommodation of British technicians during the period of the agreement); and the installations noted above which Egypt shall maintain.

Section 5 of Part A provides that upon the withdrawal of British forces from the base, the Egyptian Government shall assume responsibility for the security of all base installations and equipment. Section 6 provides that the United Kingdom Government shall maintain and operate the installations listed in Section 2(a) and the British equipment therein by concluding contracts with one or more British or Egyptian commercial firms referred to hereinafter as "contractors." These contractors, according to Section 8, will have the right to employ British technicians up to a total of 1,200 but not exceeding for those recruited outside Egypt a total of 800, as well as Egyptian technicians and such local labor engaged in Egypt as may be required. Subject to certain specified exemptions, companies and partnerships acting as contractors, as well as their personnel, shall be subject to Egyptian law with respect to their activities in Egypt. The British Government is authorized to attach temporary personnel, not to exceed five in number, to its Cairo Embassy for the purpose of carrying out inspections of its designated installations.

The exchanges of notes deal with such matters as immunities to be enjoyed by British forces during the withdrawal period;⁵⁶ operation and

⁵³ See reference to British and Egyptian announcements to that effect in *New York Times*, June 19, 1955, p. 27.

⁵⁴ For example, a "hand-over document" of each installation is to be prepared by the British forces in such detail as may be agreed upon between the respective headquarters, and to be handed over to the Egyptian authorities in advance of the transfer to enable the latter to assess the security and maintenance problems and to make appropriate arrangements to deal with them. Annex I, Pt. B, Sec. 8.

⁵⁵ This port, considered the largest military port in the Middle East, apparently was turned over to the Egyptian authorities in September, 1954.

⁵⁶ Note 1 provides that "Members of the British Forces shall not be subject to the criminal jurisdiction of the Courts of Egypt, or to the civil jurisdiction of those Courts in any matter arising out of their official duties."

maintenance of the pipeline running from Suez to Cairo;⁵⁷ elaboration of Article 7 of the main agreement regarding flights of aircraft; the application of Egyptian exchange control regulations to contractors and British technicians in their employ; the waiver of claims between the two governments arising out of the 1936 treaty or occasioned by the presence of British troops in Egypt; the employment by the British Government of civilian officials to exercise financial supervision and control over the civilian contractors;⁵⁸ and arrangements for fueling facilities for Royal Navy ships following the transfer by Britain to Egypt of oil installations at Port Said.

Article 4 of the agreement deals with reactivation of the base. It states that in the event of an armed attack by an "outside Power" on any country which at the date of signature of the present agreement (October 19, 1954) is a member of the Arab Collective Security Pact, or on Turkey, Egypt shall afford to the United Kingdom such facilities as may be necessary in order to place the base on a war footing and operate it effectively. These facilities shall include the use of Egyptian ports which are indispensable for carrying out the above purpose. Article 6 provides for consultation between Egypt and the United Kingdom in the event of the threat of such attack. The agreed minute attached to the agreement provides that the expression "outside Power" as used in Articles 4 and 6 means any country other than the countries referred to in those articles, and Israel. Thus the agreement would not become operative in the event of an attack by a member of the Arab Collective Security Pact upon another member or upon Turkey, an attack by Turkey upon a member of the pact, or an attack by Israel on any of these Powers.

Article 5 provides that in the event the base is reactivated in accordance with Article 4, the British occupying forces shall withdraw immediately upon the cessation of hostilities. The agreed minute expresses the understanding that Article 5 means that such withdrawal will commence as soon as hostilities cease, and be completed without delay.

Article 10 affirms that the agreement "does not affect and shall not be interpreted as affecting in any way the rights and obligations of the parties under the Charter of the United Nations."

By virtue of Article 8 the parties "recognize that the Suez Maritime Canal, which is an integral part of Egypt, is a waterway economically, commercially and strategically of international importance, and express the determination to uphold the Convention guaranteeing the freedom of navigation of the Canal signed at Constantinople on the 29th of October, 1888."⁵⁹

⁵⁷ Note 7. The annex to Note 7(b) gives details regarding the pipeline system and its installations which are to be handed over. On Jan. 1, 1955, the British authorities turned over to Egypt the control of this 87-mile pipeline, which, however, will be made available to British forces in the event the base is reactivated. *New York Times*, Jan. 2, 1955, p. 2.

⁵⁸ Note 13, dealing with this matter, also provides that British inspectors of installations shall wear civilian clothes when paying visits of inspection.

⁵⁹ See note 14 *supra*.

Article 13 provides that the agreement shall have effect as though it had entered into force on the date of signature, while Article 12 states that it shall remain in force for a period of seven years from that date. Article 12 provides that during the last twelve months of the agreement's duration the contracting parties shall consult together regarding arrangements which may be necessary upon the agreement's termination, and that, unless both parties agree to extend the agreement, it shall terminate upon the expiration date, whereupon the United Kingdom Government shall take away or otherwise dispose of its property remaining in the Base.

The 1954 Base Agreement has been hailed both by the Egyptian and British governments as a satisfactory compromise. Thus Prime Minister 'Abd al-Nāsir has emphasized that the agreement releases Egypt from the 1936 treaty in perpetuity,⁶⁰ and Minister of National Guidance Salāh Sālīm has commented that aggression against Turkey would result in world war, in which event Egypt would be greatly benefited by having Britain's support.⁶¹ British Minister of State Anthony Nutting told the House of Commons on November 2, 1954, that "... the agreement gives us all we require in the way of workshop repair facilities for our forces in the Middle East, storage of war reserves, transit rights and servicing for the Royal Air Force. . . . At the same time we have eliminated the main source of friction between ourselves and the Arab world."⁶² Minister of War Anthony Head has stated that with Turkey in NATO, and with the "northern tier" arrangement involving Turkey and Pakistan, the old reliance on the Suez base is replaced by a newer concept of area defense.⁶³

Elements both in Egypt and Britain have been hostile to the agreement, however. *Al-Ikhwan al-Muslimūn* (The Muslim Brethren),⁶⁴ a religious movement advocating Islamic revival in the Muslim world, which was especially powerful in Egypt until its dissolution following an unsuccessful coup against the Revolutionary Command Council in October, 1954, during which an attempt was made on Prime Minister 'Abd al-Nāsir's life, sought to sabotage the agreement. The exiled newspaper publisher, Mahmūd Abu al-Fath, in a critical comment in the *London Times*, stated that the agreement was not consented to in Egypt through parliamentary procedures, that it extended British rights beyond 1956, and that it created the possibility of involving Egypt in wars not of its own making.⁶⁵ A group of Conservative Members of the British Parliament, die-hard upholders of the Empire, threatened to split the Conservative majority on the evacuation issue, and its leader, Captain Waterhouse, said that "this is not a sell-out; this is a give-away."⁶⁶ Lord Beaverbrook's empire-minded *Daily Express* called it "the greatest surrender . . . since the Socialists

⁶⁰ The 1936 treaty provided for a continuing alliance after 1956.

⁶¹ New York Times, July 31, 1954, p. 6.

⁶² Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 532, No. 171, Nov. 2, 1954, col. 222.

⁶³ New York Times, July 30, 1954; Beirut Daily Star, July 29, 1954, p. 1.

⁶⁴ See J. Heyworth-Dunne, *Religious and Political Trends in Modern Egypt* (Wash., D. C., 1950).

⁶⁵ London Times, Aug. 4, 1954, p. 7.

⁶⁶ New York Times, July 30, 1954.

and Mountbatten engineered the scuttle of India." The reaction of the rest of the British press was mixed.⁶⁷

News of the conclusion of the agreement was received with consternation in Israel, where fear of a "second round" with strengthened Arab states has created a problem for the government. Prime Minister Sharett told the *Knesset* (Parliament) on August 30, 1954, that the agreement had been drafted as though Israel did not exist, and that its conclusion, especially if Egypt received military aid from the West, would upset the balance of power between the Israelis and the Arabs, and harm the peace and security of the Middle East. He had stated earlier that Egypt should be required to make peace with Israel as a condition precedent to receiving the base, or else Israel should be strengthened militarily.⁶⁸

Israeli alarm was motivated partly by the lifting of the embargo on the export of arms to Egypt by Britain, partly by the fear that the departure of the British would result in more stringent Egyptian measures against Israeli-connected shipping engaged in transit of the Suez Canal, and partly by the prospect of the removal of the buffer zone created by the presence of British forces in the Canal Zone, which is situated between the principal part of Egypt and the Sinai and Gaza areas, the first of which is an integral part of Egypt, while the second is under Egyptian control.⁶⁹ This fear apparently was heightened by an Egyptian suggestion that Israel give up to the Arabs the Negev, the large strip of desert in southern Israel which separates Egypt from Jordan.⁷⁰

In announcing to the press on August 30, 1954, that Britain was lifting the embargo on export of arms to Egypt, which had been imposed in October, 1951, after Egypt's abrogation of the 1936 treaty, a British spokesman made it clear that export licenses would be issued "subject always to the application of the principles accepted by Her Majesty's Government in the Tripartite Declaration of May 25, 1950."⁷¹ Sir Anthony Eden later referred in the House of Commons to the May, 1950, Declaration,⁷² and stated that by its terms the United Kingdom, the United States, and France are bound to assist Israel if that country should be attacked by an Arab state. He said that arms deliveries would be made "only on the basis of the 1950 Declaration, that is to say, that we shall continue to keep a balance as between Israel and the Arab States collectively. . . . The last thing that I want to see is anything in the nature of an arms race

⁶⁷ *Ibid.*, July 29, 1954.

⁶⁸ New York Times, July 29, 1954.

⁶⁹ A number of Israeli-Egyptian border clashes have occurred along the border of the Gaza strip during 1955. See *ibid.*, June 5, 1955, p. 1.

⁷⁰ According to an article in the New York Times, Major Salāh Sālim had suggested that ceding the Negev to Arab control, and thus creating a land link between Egypt and her Arab neighbors to the East, might influence Egypt to join a Western defense alliance. An Israeli Foreign Office spokesman, referring to Sālim's suggestion, stated that Israeli territory would not "serve as a *quid pro quo* for a political or military arrangement of any kind." *Loc. cit.*, March 22, 1955, p. 14.

⁷¹ *Ibid.*, Aug. 31, 1954, pp. 1, 4.

⁷² For text thereof see New York Times, May 26, 1950, p. 6; comment appears *ibid.*, pp. 1, 6.

in that part of the world. It would be quite disastrous in the present much inflamed atmosphere." ⁷³

The Israeli Government was not reassured, however, by the existence of the Tripartite Declaration, and has sought firmer assurances of support, particularly from the United States. On June 18, 1955, Israeli Ambassador to the United States Abba Eban, describing his country's position as "one of siege and regional solitude," stated that "the existence of treaty relationships between some of America's allies and the Arab states further emphasizes the lack of equilibrium in the security structure of the Middle East." Commenting on the Israeli Government's desire for a mutual defense pact with the United States, he said that the "United States has a unique opportunity to make a decisive contribution to the stability of the Middle East." ⁷⁴

Another question of vital interest to Israel is that of freedom of transit for its vessels through the Suez Canal pursuant to the guarantees contained in the Constantinople Convention of 1888, which guarantees, as we have seen, have been reaffirmed by Article 8 of the October 19, 1954, Agreement. As a result of the Palestine hostilities of 1948, Egypt instituted, as part of the Arab blockade of Israel, restrictions with respect to Canal transit of ships and goods coming from or going to Israel. ⁷⁵ Egypt has justified its action as necessary to defend the security of the Suez Canal, as provided in Article X of the Constantinople Convention. It considers that the Palestine hostilities amounted to a state of war, and that the Rhodes Armistice Agreement merely ended the active fighting, but not the war itself, since no peace treaty was signed. ⁷⁶ Israel, however, interprets the Rhodes Armistice Agreement of February 24, 1949, ⁷⁷ as having ended the war, if indeed, war ever existed. Israeli Ambassador Eban affirmed in the Security Council in 1951 that: "My Government instructs me to declare that Israel is in no state of war with Egypt and denies that Egypt has the least right to be at war with Israel." ⁷⁸ A study of the restrictions prob-

⁷³ Hansard, cited note 62 *supra*, cols. 326-328.

⁷⁴ New York Times, June 19, 1955, p. 16.

⁷⁵ See J. C. Hurewitz, "Arab-Israel Tensions," 24 Proceedings of the Academy of Political Science 73-81 (1952), especially at 78.

On Nov. 2, 1954, Minister of State Anthony Nutting defined the extent of these restrictions. He said in the House of Commons that "it is only those ships carrying strategic cargoes for Israel, together, of course, with all Israeli shipping whatever the cargo, that are denied passage . . . the sort of cargoes which are allowed through, in non-Israeli ships, are food supplies, meat supplies, and so on—non-strategic cargoes. In other words, cargoes outside the range of such things as oil supplies, which are included in strategic cargoes for this purpose." Hansard, *loc. cit.*, cols. 219-220.

⁷⁶ See statement by Egyptian Delegate Fawzi before the Security Council, Official Records, 550th Meeting, Aug. 1, 1951, Doc. S/P.V. 550, pp. 4-6; statement by RCC member Salāh Sālim, New York Times, Sept. 29, 1954, p. 1; and statement by Egyptian Delegate Azmi before the Security Council, Verbatim Record, 682nd Meeting, Oct. 14, 1954, Doc. S/P.V. 682, p. 52.

⁷⁷ For text, see Security Council, Official Records, 4th year, Spec. Supp. No. 3.

⁷⁸ Official Records, 549th Meeting, July 26, 1951, Doc. S/P.V. 549, pp. 2-14, at p. 12.

lem sponsored by the Lawyers Committee on Blockades, a group of United States lawyers and law professors, concludes by stating that Egypt's interference with the passage of goods through the Suez Canal runs counter to: (a) The Suez Canal Convention of 1888; (b) The Egyptian-Israel General Armistice Agreement; (c) The Charter of the United Nations; and (d) decisions of organs of the United Nations.⁷⁹

Although several Security Council resolutions calling for a termination of Egyptian interference with Israeli-connected shipping⁸⁰ passed unheeded, early in 1954 Egypt did relax its policy of restrictions. Egyptian Delegate Azmi informed the Security Council on March 29, 1954, that "Egypt, freed from the pressure which was being brought to bear on her through the draft resolution⁸¹ . . . will of its own free will move towards tolerance."⁸² During the discussions concerning the *Bat Galim* incident, Mr. Azmi referred, on October 14, 1954, to his March 29 statement, and added: "I affirm that, since that statement was made, Egypt has not only displayed tolerance but has also observed absolute silence and has refrained from any interference with vessels conveying goods to Israel or coming from Israel ports and passing through the Suez Canal."⁸³

The question of freedom of passage through the Canal for Israeli vessels was brought into sharp focus by the *Bat Galim* incident of September 28, 1954. Israel customarily had employed foreign bottoms to carry its waterborne freight through the Canal, but the freighter *Bat Galim* was manned by an Israeli crew and flew the Israeli flag. It was seized by Egyptian authorities near the southern terminus of the Canal on the above date, ostensibly for firing on Egyptian fishermen, but apparently in reality because it sought to transit the Canal. Israel immediately protested the seizure to the Security Council,⁸⁴ and affirmed the right of an Israeli ship freely to pass through the Canal under the Constantinople Convention, "whose binding force Egypt has only recently reaffirmed" (referring to the Heads of Agreement of July 27, 1954).⁸⁵ On October 4 the Israeli Government requested the Security Council to consider the question.⁸⁶ An Egyptian spokesman informed the Security Council on December 7 that Egypt would not permit a vessel sailing under the Israeli flag to transit the Canal; he insisted that this was necessitated by the requirements of legitimate defense against possible sabotage of the vital waterway by a

⁷⁹ Pamphlet entitled "The United Nations and the Egyptian Blockade of the Suez Canal" (Lawyers Committee on Blockades, N. Y.). Conclusions appear on p. 25.

⁸⁰ Resolutions of Aug. 11, 1949 (S/1376), Nov. 17, 1950 (S/1907), and Sept. 1, 1951 (S/2322). And see U.N. Press Release (SC/1567), Jan. 28, 1954, entitled "The Suez Canal Shipping Issue."

⁸¹ On March 23, 1954, New Zealand introduced in the Security Council a draft resolution intended to reaffirm the Sept. 1, 1951, resolution, but it was vetoed on March 29, 1954, by the Soviet Union. New York Times, March 24 and 30, 1954.

⁸² Official Records, 664th Meeting, March 29, 1954, Doc. S/P.V. 664, p. 23.

⁸³ Verbatim Record, 682nd Meeting, Oct. 14, 1954, Doc. S/P.V. 682, pp. 57-58.

⁸⁴ See Eliezer Erel, "The *Bat Galim* Case before the Security Council," 6 Middle Eastern Affairs 108-117 (1955).

⁸⁵ New York Times, Sept. 29, 1954, p. 2; *ibid.*, Sept. 30, 1954, p. 13.

⁸⁶ *Ibid.*, Oct. 5, 1954, p. 13.

hostile Power, in accordance with Article X of the Constantinople Convention.⁸⁷ Although the Egyptian Government released the ten Israeli crew members of the *Bat Galim* on January 1, 1955, at a Gaza Strip outpost,⁸⁸ it had not released the vessel by June, 1955, and has remained firm in its position of barring passage through the Canal to Israeli flag vessels. On January 4, 1955, the day the Security Council took up the *Bat Galim* Question, Foreign Minister Fawzi stated that Egypt would release the vessel and cargo, but that this release would not affect its position regarding the right to refuse Canal passage to Israeli shipping.⁸⁹ The United States, United Kingdom, and France supported Israeli's demand in the Security Council, although praising at the same time Egypt's conciliatory attitude in releasing the crew. U. S. Delegate Lodge told the Council that Egyptian restrictions on ships transiting the Canal, whether trading with Israel or flying the Israeli flag, were inconsistent with the "spirit and intent" of the Rhodes Armistice Agreement, and were contrary to the September 1, 1951, Security Council resolution.⁹⁰ Opposition leader Herbert Morrison stated in the British House of Commons on November 2, 1954, that: "It appears to us that this action of Egypt's is a breach of the 1888 Convention—I think that is agreed on both sides of the House—and that it is unlawful as to the shipping of Israel, Britain and other countries."⁹¹ Sir Anthony Eden told the House on the same day that:

In the view of Her Majesty's Government, Egypt is acting unlawfully in stopping even strategic cargoes bound for Israel from going through the Canal. We expressed that view more than once in the United Nations . . . the Egyptian argument . . . is based on the Egyptian claim to be exercising a belligerent right which they derive from Article X of the Suez Canal Convention of 1888. . . . It allows her to take action in respect of the Canal in defense of Egypt. Article X declares that Egypt can waive certain articles (of the Constantinople Convention) . . . for the defense of Egypt . . . we do not accept this because we do not accept that Egypt is a belligerent.⁹²

Israel has cited the *Bat Galim* incident as an example of the danger which lies in making Egypt the sole guardian of the Canal.

No member of the Security Council introduced a new resolution during that body's consideration of the *Bat Galim* case, which ended on January 13, 1955. The Soviet veto of March 29, 1954, of a resolution introduced during debate at that time may have influenced this decision.⁹³ The President of the Council declared at the conclusion of the debate on January 13 that

it is evident that most representatives here regard the resolution of 1 September 1951 as having continuing validity and effect, and it is in this context and that of the 1888 Convention that they have considered the *Bat Galim* case. In so far as steps have been taken by Egypt towards a settlement—for example, the release of the crew and the

⁸⁷ *Ibid.*, Dec. 8, 1954, p. 5.

⁸⁸ *Ibid.*, Jan. 2, 1955, p. 2.

⁸⁹ *Ibid.*, Jan. 5, 1955, p. 8.

⁹⁰ *Ibid.*

⁹¹ Hansard, *loc. cit.*, col. 235.

⁹² *Ibid.*, col. 331.

⁹³ See note 81 *supra*.

announcement by the Egyptian Government of its willingness to release the cargo and the ship itself—these steps have been welcomed by representatives around this table.⁹⁴

The Base Agreement has done nothing to lessen existing tensions between Egypt and Israel. The increase during 1955 of incidents along the Gaza Strip boundary with Israel would seem to have no necessary connection, however, with the conclusion of the agreement. In January, 1955, Prime Minister 'Abd al-Nāsir stated in an article in the journal *Foreign Affairs* that Egypt had no desire to attack Israel. He said that British evacuation of the Canal base will not create a military vacuum in the Middle East, but rather will pave the way for strengthening the area's defenses. The Prime Minister expressed the view that area defense was primarily the responsibility of the local states, and reaffirmed his belief in the Arab Collective Security Pact as the true basis for the security of the area, aided by "those more developed powers who believe in peace . . . and will help us to strengthen ourselves against aggression."⁹⁵

Early in 1955 an event designed to contribute to the building up of the defenses of the Middle East against outside aggression occurred; however, it took place outside the framework of the Arab Collective Security Pact. Iraq and Turkey signed at Baghdad, on February 24, 1955, a treaty whereby they agreed to co-operate for mutual security and defense in a manner consistent with Article 51 of the United Nations Charter.⁹⁶ This pact implied on Iraq's part co-operation with the West rather than pursuance of a course of action parallel to Egypt's policy regarding area security. Turkey is a member of NATO, and a party to the Agreement for Friendly Co-operation between Pakistan and Turkey,⁹⁷ the Turk-Pak pact, an agreement which initiated the "northern tier" defense concept, described, as we have seen, by British War Minister Anthony Head as replacing the old reliance on the Suez Canal base.⁹⁸ The United Kingdom adhered to the Turco-Iraqi alliance on April 4, 1955, and deposited its instrument of adherence two days later.⁹⁹ At the same time a special British-Iraqi Defense Agreement, designed to replace the 1930 treaty¹⁰⁰

⁹⁴ Verbatim Record, 688th Meeting, Jan. 13, 1955, Doc. S/P.V. 688, p. 39.

⁹⁵ Gamal Abdel Nasser (Gamal 'Abd al-Nāsir), "The Eyyptian Revolution," 43 *Foreign Affairs* 199-211 (1955), material quoted at p. 210.

⁹⁶ *New York Times*, Feb. 25, 1955, pp. 1, 5. Both parties ratified on Feb. 26, 1955, whereupon ratifications were exchanged. See *Washington Sunday Star*, Feb. 27, 1955, p. 34. For the text of the Pact of Mutual Cooperation between Iraq and Turkey, see 9 *Middle East Journal* 177-178 (1955), comment, *ibid.* 163-166.

⁹⁷ For text see 8 *Middle East Journal* 337-338 (1954). The agreement was signed at Karachi on April 2, 1954, and entered into force on the exchange of instruments of ratification at Ankara on June 12, 1954. It provides that the parties will consult to determine how co-operation might be effected in accordance with Art. 51 of the U.N. Charter, should an unprovoked attack occur against them from the outside. It contains an accession clause.

⁹⁸ See note 63 *supra*.

⁹⁹ *New York Times*, March 31, 1955, p. 6.

¹⁰⁰ The Treaty of Alliance Between His Majesty in Respect of the United Kingdom and His Majesty the King of Iraq, signed on June 30, 1930. For text see Helen Miller Davis, *Constitutions, Electoral Laws, Treaties of States in the Near and Middle East* 191-196 (2nd ed., Durham, N. C., 1953).

which was due to expire in 1957, was entered into. Under this special agreement the Habbaniyah and Shaibah air bases in Iraq, occupied by British forces for twenty years, were transferred to the Iraqi forces.¹⁰¹ Subsequently Pakistan and Iran acceded to the Turco-Iraqi pact,¹⁰² thus advancing the "northern tier" concept well on the way toward fruition.

Egypt reacted unfavorably to the conclusion of the Turco-Iraqi alliance, and complained that it was entered into by Iraq without previously consulting the other Arab Pact members. However, the doctrine *rebus sic stantibus* was not invoked directly to assert that Iraq's new commitments to Turkey enlarge the obligations of the members of the Arab Pact.¹⁰³ Nevertheless Prime Minister 'Abd al-Nāsir expressed his "determined opposition" to big-Power participation in Middle East security arrangements,¹⁰⁴ and the Egyptian Government has announced plans to join with Syria and Saudi Arabia in a new military and economic alliance which would be a public repudiation of the Turco-Iraqi pact. Although Saudi Arabia, because of the old Saudi-Hashemite¹⁰⁵ feud, "traditionally supports any maneuver that lessens Iraq's shadow," getting Syria to join may be more difficult.¹⁰⁶ There has been speculation that the Iraqi-Egyptian split over the question of area defense might result in the breakdown of the Arab League and of the Arab Collective Security Pact.¹⁰⁷ As of June, 1955, however, the proposed pact between Egypt, Syria, and Saudi Arabia had not been firmed up, and there were indications that Egypt and Iraq were beginning to patch up their difficulties.¹⁰⁸

The Suez Canal Base Agreement of 1954 in effect makes the base available to the West for a limited period of time in case of emergency, and does so with the consent of the territorial sovereign. This is a great advantage, for the importance of the Canal as a strategic and economic asset of the highest order, and of the base as a valuable military installation in

¹⁰¹ New York Times, May 3, 1955, p. 6. ¹⁰² 33 Dept. of State Bull. 534, 653.

¹⁰³ See "Turkey-Iraq Pact Opens New Chapter in Mideast," New York Times, News of the Week in Review, Feb. 27, 1955, p. 5; March 3, 1955, p. 5. Iraq does not regard its membership in the Turco-Iraqi pact as inconsistent with its commitments to the ACSP, and Art. IV of the former agreement declares that the obligations of the pact are not in contradiction with any of the international obligations contracted by either of the parties with any third state or states.

¹⁰⁴ Statement made in Calcutta on way home from the Bandung Conference, noted in The Reporter, June 16, 1955, pp. 24-25; the article discusses the problem of Middle Eastern pacts.

¹⁰⁵ The Hashemite dynasty today rules in Iraq and Jordan; it formerly ruled the Hejaz, its ancestral home, from which it was ousted in 1925 by the Saudis, who incorporated the Hejaz in their domain in 1926. In 1932 King Ibn Saud changed the name of his Kingdom from the Kingdom of the Hejaz and Nejd to Saudi Arabia, the "Arabia of the Sands." See R. H. Sanger, The Arabian Peninsula 32-34 (Ithaca, 1954).

¹⁰⁶ Note entitled "Arab Leaguelet," The Economist (London), Vol. 174, March 12, 1955, p. 884; and see "Egyptian-Iraq Differences Generating New Defense Alignments in Middle East," in Middle East Report, Vol. VII, Feb. 28, 1955, pp. 1, 4.

¹⁰⁷ New York Times, Feb. 26, 1955, p. 4; and March 3, 1955, p. 5.

¹⁰⁸ *Ibid.*, June 4, 1955, p. 2.

the event the defense of the Middle East becomes necessary, would seem to be beyond question. The recent emphasis on "northern tier" defense would seem to be due only partly to the necessity for British evacuation of the base; the Western Powers have been seeking regional defense arrangements for several years.¹⁰⁹ It is apparently hoped that Egypt's policy that regional security be based entirely on the local states may be modified eventually so that outside help (from the West) may be made available for the defense of those parts of the area which have thus far remained aloof from any alignment with the West. The continuing seriousness of the Arab-Israeli problem, however, considerably complicates this issue.

¹⁰⁹ See notes 37 and 38 *supra*.

AMERICAN CONSULAR JURISDICTION IN MOROCCO AND THE TANGIER INTERNATIONAL JURISDICTION

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In a litigation between the United States and France and Morocco, the International Court of Justice had to determine not so long ago¹ whether United States consular jurisdiction in the French Zone of the Protectorate of Morocco extended merely to disputes among nationals and protégés of the United States, as provided for in its treaty with Morocco of 1836,² or to all cases in which an American citizen or protégé is a defendant. The latter—extended—type of consular jurisdiction had accrued to the United States through the operation of most-favored-nation clauses contained in its treaties with Morocco.³ The French Government took the position that, because all other nations with the right to consular jurisdiction in Morocco had given up this right for the French Zone, the United States no longer had the right to the extended consular jurisdiction and was confined to jurisdiction over disputes among American nationals (and protégés). It was the United States contention that the right to the extended jurisdiction had been acquired permanently by treaty and also by custom and usage. The International Court of Justice ruled against the United States on this point⁴ by a vote of six to five.⁵ The majority took the view that the ex-

¹ Case concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.), [1952] I.C.J. Reports 176; 80 Journal du Droit International [hereafter cited as *Clunet*] 725 (1953); digested in 47 A.J.I.L. 136 (1953).

² Treaty of Sept. 18, 1836 (8 Stat. 484), Art. 20; 1 Malloy, *Treaties* 1212 (1910); D. H. Miller, *Treaties, etc.*, Vol. IV (1934), p. 33.

³ Notably, Treaty of Sept. 18, 1836, cited *supra*, Art. 24.

⁴ Note 1 *supra*. The decision has been discussed in: Manley O. Hudson, "The Thirty-First Year of the World Court," 47 A.J.I.L. 1, 8 (1953); Joseph M. Sweeney, "Treaty Rights of the United States in Morocco," 27 Dept. of State Bulletin 620 (1952); G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice (1951-1954)," 30 British Yearbook of International Law 1, 58 (1953); D. H. N. Johnson, "The Case concerning Rights of Nationals of the U.S.A. in Morocco," 29 *ibid.* 401 (1952); Bin Cheng, "Rights of U. S. Nationals in the French Zone of Morocco," 2 International and Comparative Law Quarterly 354 (1953); J. M. Sweeney, "Rights of U. S. Nationals in Morocco," 4 *ibid.* 145 (1955); J. de Soto, "Judgment of the International Court of Justice of 27 August 1952," 80 *Clunet* 517 (1953); A. de Laubadière, "Le statut international du Maroc et l'arrêt de la Cour internationale de Justice," 6 Revue Juridique et Politique de l'Union Française 429 (1952); L. Fougère, "L'arrêt de la Cour internationale de justice du 27 août 1952," 32 Gazette des Tribunaux du Maroc 141 (1952); Claude Fournier, "Le différend franco-américain au sujet des importations américaines au Maroc," 68 Revue Algérienne, Tunisienne et Marocaine de Législation et de Jurisprudence 269 (1952); Claude Rossillon, "The Most-Favored-Nation Clause in Case Law of the International Court of Justice," 82 *Clunet* 77, 93 *et seq.* (1955).

⁵ Sir Arnold McNair, President, and Judges Basdevant, Hackworth, Zoričić, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro, Sir Benegal Rau, M. Armand-Ugon, participated.

tended consular jurisdiction had ended with the coming into operation of the convention between France and Great Britain of 1937⁶ by which Great Britain, the last of the nations with treaty rights to the extended consular jurisdiction, had relinquished the right in the French Zone. As a result of the decision, cases brought against nationals and protégés of the United States by nationals of other countries are now adjudicated in the French Zone by the courts established in that Zone to hear cases involving French nationals and nationals of countries which have relinquished extra-territorial rights.⁷ These courts are organized like the French courts.⁸

The International Court of Justice had made it clear⁹ that it did not rule upon the legal situation in the other parts of Morocco, the Spanish and the International Zones. For the Spanish Zone Great Britain has not relinquished treaty rights to consular jurisdiction. The United States thus continues to hold in that Zone through the most-favored-nation clauses, as a matter of treaty law, the right to the extended consular jurisdiction.¹⁰ Like the French Zone, the Spanish Zone has special courts—organized like the Spanish courts—to hear cases involving Spanish nationals and nationals of countries which have relinquished extraterritorial rights.¹¹

In the International Zone—Tangier with its 125,000 to 150,000 inhabitants¹²—the situation is more involved. The basic law of the International Zone is the Paris Convention of December 18, 1923,¹³ regarding the Organization of the Statute of the Tangier Zone, as amended by the Agreement of July 25, 1928.¹⁴ By this convention an international tri-

Judges Hackworth, Badawi, Levi Carneiro, and Rau filed a dissenting opinion, [1952] I.C.J. Reports 215; 80 Clunet 771 (1953).

⁶ 184 League of Nations Treaty Series 351; 34 A.J.I.L. Supp. 225 (1940).

⁷ *E.g.*, Rabat Appeal Court, March 10, 1954, 6 *Revue Marocaine de Droit* 407 (1954) (money due); same court, Nov. 12, 1952, 5 *ibid.* 40 (1953), [1953] *Juris-Classeur Périodique* II. # 7678, noted by André Gross, [1954] *Recueil Sirey* II. p. 97, noted by P.-Louis Rivière (expulsion from premises); Casablanca Criminal Court, Nov. 6, 1952, 80 *Clunet* 667 (1953) (prosecution for murder of Marr, an American). *Cf.* F. Brémard, "Les conséquences de l'arrêt de La Haye en matière d'organisation judiciaire marocaine," 32 *Gazette des Tribunaux du Maroc* 147 (1952).

⁸ See Herbert Liebesny, *The Government of French North Africa* 25 (1943); Jacques Caillé, *Organisation judiciaire et procédure marocaines* 141 (Paris, 1948).

⁹ [1952] I.C.J. Reports 186; 80 *Clunet* 737 (1953).

¹⁰ See 2 Hackworth, *Digest of International Law* 507 (1941). On the Protectorate, see 1 *ibid.* 85. *Cf.* Eugenio Mora Regil, "El régimen de capitulaciones en Marruecos," 2 *Revista Jurídica de Marruecos* 77 (1951).

¹¹ See Manuel de la Plaza, *Derecho de Marruecos* 107 (Madrid, 1941); Cesareo Rodríguez Aguilera, *Manual de Derecho de Marruecos* 133 (Barcelona, 1952).

¹² The Tangier Zone is an "internationally administered city of Morocco." Charles Rousseau, *Droit International Public* 175 (1953). *Cf.* 1 Hackworth, *op. cit.* 92; Opinion of the Swiss Political Department, 10 *Annuaire Suisse de Droit International* 238, 245 (1953).

In addition to the native population of about 100,000 ($\frac{3}{4}$ Moslem and $\frac{1}{4}$ Jews), there are about 30,000 Spanish, 6,000 French, 1,500 English, and 400 American resident foreigners.

¹³ 28 League of Nations Treaty Series 542; 23 A.J.I.L. Supp. 235 (1929).

¹⁴ 87 League of Nations Treaty Series 211; 23 A.J.I.L. Supp. 281 (1929).

bunal has been put in charge of the administration of justice over nationals of foreign Powers.¹⁵ Article 13 (1) provides:

As a result of the establishment at Tangier of the Mixed Court, as provided in Article 48, the Capitulations shall be abrogated in the Zone. This abrogation shall entail the suppression of the system of protection.

Great Britain is among the signatories of the Paris Convention. The United States never acceded to it.¹⁶

Recently, the question of the extent of United States consular jurisdiction in the International Zone arose in the courts of the Zone in the course of a private litigation. The courts of the Zone, called the "International Jurisdiction" since a reorganization of the court system which took place in 1953,¹⁷ are a court of appeal, a court of first instance, a criminal court, an investigating judge and a justice of the peace. There are twelve judges altogether, two of Spanish and two of French nationality, and one each from Belgium, Great Britain, Italy, The Netherlands, Portugal, Sweden, the United States¹⁸ and Morocco. The court of first instance has three members. The court of appeal is composed of four judges and sits with three members. The court of appeal has one Spanish and one French judge and two of two other nationalities assigned for four years on the basis of seniority. The assignment to the various courts is by the general assembly of the judges for one year.¹⁹

In 1953, two Moroccan residents of Tangier brought suit in the court of first instance of the International Jurisdiction against the Mackay Radio and Telegraph Company, an American corporation with an office in Tangier, for delivery of the duplicate deed to certain land in the Zone which

¹⁵ See Graham H. Stuart, *The International City of Tangier* 193 (1931); Manley O. Hudson, "Tangier International Mixed Court," 21 A.J.I.L. 231 (1927); Kurt H. Nadelmann, "Twenty-Five Years of Mixed Court of Tangier," 1 American Journal of Comparative Law 115 (1952). In 1948, more than 3,000 judgments were rendered by the Mixed Court according to Manuel Diaz Merry, *Tanger Tratados, Codigos, Leyes y Jurisprudencia de la Zona Internacional* 33 (Tangier, 1950). The court exercises judicial control over the constitutionality of acts passed by the International Legislative Assembly of the Zone. *Re Aerts (Pro-Radio) and Azerraf (Radio Tanger)*, Mixed Court, Appellate Division, March 10, 1939, 66 *Clunet* 670 (1939); 7 *Nouvelle Revue de Droit International Privé* 284 (1940); [1938-1940] *Annual Digest of Public International Law Cases* 52; *Re Nordlund*, Mixed Court, Dec. 20, 1948, 60 *Penant Recueil Général de Jurisprudence, de Doctrine et de Législation Coloniales et Maritimes*, I, 62 (1950); [1948] *Annual Digest* 327. ¹⁶ See 2 Hackworth, *op. cit.* 509.

¹⁷ *Dahir of the Sultan of Morocco of June 10, 1953*, Tangier Zone Official Bulletin No. 479, Aug. 1, 1953, p. 31; *Información Jurídica* (Madrid, 1953), No. 127, p. 1128; J.A.C. Gutteridge, "The Reform of the Mixed Court at Tangier," 30 *British Year Book of International Law* 498 (1953); G. Balazue, "La réforme judiciaire à Tanger," 5 *Revue Marocaine de Droit* 350 (1953); Paul Decroux, "Organisation judiciaire de la Zone internationale de Tanger," 8 *Revue Juridique et Politique de l'Union Française* 380 (1954).

¹⁸ Before the reform of 1953, neither the United States nor Morocco was represented on the Court.

¹⁹ As reported in *Astrea* (Tangier), No. 34, of Jan. 1954, p. 3, for the first year after reorganization one of the French judges and the Dutch and the Swedish judges were assigned to the court of first instance for civil matters.

was the object of a contract of purchase and sale between the parties. The defendant claimed that the Consular Court of the United States for Tangier had exclusive jurisdiction over American citizens. The existence of the exclusive jurisdiction of the Consular Court had been unchallenged before the World Court decision.²⁰ By a decision of March 9, 1954, the court of first instance of the International Jurisdiction held for the plaintiffs on the question of jurisdiction.²¹ The court adopted the reasoning of the majority of the judges in the case before the World Court and argued that, if with regard to the French Zone the extended jurisdiction of the Consular Court of the United States, accruing by way of the most-favored-nation clauses, had come to an end when Great Britain renounced the right to extraterritorial jurisdiction in the French Zone in 1937, it followed for the International Zone that the extended jurisdiction of the United States Consular Court had ceased to exist when Great Britain signed the Paris Convention of 1923 which brought about the creation of the Mixed Court and the abrogation of the capitulations.

The Court of Appeal on August 13, 1954, reversed the decision.²² It held that the right to the extended consular jurisdiction, obtained by way of the most-favored-nation clauses, had been acquired permanently and thus was unaffected by the relinquishment of extraterritorial rights by other nations, including Great Britain. The Court of Appeal thus adopted the views of the dissenting judges in the World Court case. It furthermore found that in the International Zone the United States had obtained the right to the extended consular jurisdiction by custom and usage.

As far as the parties to the litigation are concerned, this has disposed of the question of the jurisdiction of the courts of the International Jurisdiction. Whether the ruling will be followed in future cases remains to be seen.²³ The possibility of another litigation before the World Court cannot be ruled out. The practical consequence of the ruling that the International Jurisdiction cannot hear cases with a national or a protégé of the United States as defendant is that, in such cases, suit will have to be brought in the Consular Court of the United States for Tangier. Attention is thus directed to the administration of justice by our consular courts—a neglected topic.

The exercise of judicial functions by the consul in territories where the United States has extraterritorial rights is covered by provisions which

²⁰ See, *e.g.*, *Sadi v. Guesson*, Mixed Court, Nov. 8, 1949, *Astrea* (Tangier), No. 9, Sept.-Oct. 1949, I.C.J. Pleadings, Morocco Case (*France v. U.S.A.*), Vol. I (1952), p. 804.

²¹ *Lal-la Fatma Bent Si Mohamed El Khader and Si Kl Hassan Ben Tahar Ben Sallam et Lhassout (her son) v. Mackay Radio and Telegraph Co.*, 6 *Revue Marocaine de Droit* 228 (1954). Noted in 49 *A.J.I.L.* 267 (1955). Vallet, J., of France, presided.

²² Summary in 49 *A.J.I.L.* 413 (1955). The court was composed of Diaz Merry, P. J., of Spain, Apostoli, J., of Italy, and Wauters, J., of Belgium. The Zone Attorney, Rodière, of France, had asked for reversal.

²³ The Zone has, basically, the French legal system, with some Spanish elements. *Stare decisis* does not apply in France, and not in Spain after merely one decision. Cf. J.-B. Herzog, *Le droit jurisprudentiel et le Tribunal Suprême en Espagne* 115 (Toulouse, 1942); Manuel de la Plaza, *La Casación Civil* 197 (Madrid, 1944).

go back to an Act of Congress of June 22, 1860.²⁴ Under these provisions, now incorporated in the United States Code,²⁵ the consul has judicial authority in all civil cases wherein the damages sought do not exceed \$500. If the consul sees fit to decide the same without aid, his decision is final. Whenever he is of the opinion that the case involves legal perplexities and that assistance will be useful to him, or whenever the damages sought exceed \$500, he summons to sit with him not less than two nor more than three citizens of the United States of good repute and competent for the duty, to be taken from a list previously submitted to and approved by the Minister. The consul gives the judgment, with each associate noting his opinion on the record. When the consul's associates concur in his decision, it is final. If any of the associates disagrees, either party may appeal to the Minister. The Minister decides finally.²⁶ The judicial duties devolve upon the Secretary of State if there be no Minister.²⁷ No recourse is available to our domestic courts. This is contrary to the practice of other nations.²⁸

On the law to be applied in the consular courts, the Act of Congress of 1860 provides that:

Jurisdiction is exercised and enforced in conformity with the laws of the United States, extended over all citizens of the United States in those countries and over all others to the extent that the terms of the treaties, respectively, justify and require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law nor the law of equity or admiralty nor the statutes of the United States furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decree and regulations, which shall have the force of law, supply such defects and deficiencies.²⁹

Little imagination is needed to see the difficulties which can arise in determining the substantive law to be applied. The discussions preceding the establishment in 1906 of the United States Court for China³⁰ and the published decisions of that court³¹ may be recalled. The Constitution of the United States is not included in the terms of reference of the Act of 1860, and the Supreme Court ruled in 1891 in *In re Ross*³² that the Con-

²⁴ Act of June 22, 1860, 12 Stat. 73. Cf. Sen. Exec. Doc. No. 34, 36th Cong., 1st Sess. (1860); 2 Moore, *Digest of International Law* 613 (1906).

²⁵ 22 U.S.C. §§ 141-183 (1952).

²⁶ Secs. 153 and 165.

²⁷ Sec. 176.

²⁸ Great Britain allows an appeal from the consular courts in Morocco to the Supreme Court of Gibraltar, with the possibility of a further appeal to the Judicial Committee of the Privy Council. Morocco Order in Council, 1889, as amended, in *Statutory Rules & Orders and Statutory Instruments Revised*, Vol. VIII (1950), p. 534.

²⁹ 22 U.S.C. § 145.

³⁰ See Frank E. Hinckley, *American Consular Jurisdiction in the Orient* 41 (1906).

³¹ *Extraterritorial Cases* (Charles S. Lobingier, ed.), Vols. I (1920) and II (1928).

³² 140 U. S. 354 (1891); *Casement v. Squier*, 138 F. 2d 909 (CCA 9th, 1943). Cf. *Balzac v. People of Porto Rico*, 258 U. S. 298, 305 (1921) (unincorporated territory).

stitutional guaranties of indictment by grand jury and trial by jury do not extend to proceedings under the Act. On the other hand, since *Biddle v. United States*,³³ decided in 1907, it is clear that the laws of Alaska and of the District of Columbia are "laws of the United States" within the meaning of the provisions defining the laws to be applied by consular courts.³⁴ When resort must be had to "the common law," puzzling questions arise. As early as 1855, in a legal opinion on the same provision in the precursor of the 1860 law, the legislation of 1848,³⁵ Caleb Cushing, Attorney General of the United States, had stressed that there was in the United States no one common law and that, probably, the Ministers would have to legislate as authorized under the statute.³⁶

Turning from theory to practice, how do the consular courts actually administer justice? Little is known about that. The decisions are not reported, not even those on appeal.³⁷ Yet the consular courts in Morocco had handled at least a hundred cases yearly at the time of the World Court decision.³⁸ There seems to be no good reason for not securing publication of at least all decisions rendered on appeal; ". . . it is through publicity alone that justice becomes the mother of security."³⁹ Occasionally, a decision gets into local newspapers⁴⁰ or is considered by a

But regarding Fifth Amendment, see *Seery v. U. S.*, 127 F. Supp. 601 (Ct. of Claims, 1955); *Turney v. U. S.*, 115 F. Supp. 457, 464 (Court of Claims, 1953). Cf. *Soto v. U. S.*, 273 F. 628 (CCA 3rd, 1921); *Thornberg v. Jorgensen*, 60 F. 2d 471 (CCA 3rd, 1932) (unincorporated territory). Respecting occupied territory, cf. *Best v. U. S.*, 184 F. 2d 131, 138 (CCA 1st, 1950) (Fourth Amendment); Charles Fairman, "Some New Problems of the Constitution Following the Flag," 1 Stanford Law Review 587 (1949); Sedgwick W. Green, "Applicability of American Laws to Overseas Areas Controlled by the United States," 68 Harvard Law Review 781 (1955); Arthur E. Sutherland, Jr., "The Flag, The Constitution, and International Agreements," *ibid.* 1374.

³³ 156 Fed. 759, 762, 1 Extraterritorial Cases 120 (CCA 9th, 1907).

³⁴ This may hold good also for laws for other territories—adding to the difficulties of choice. Cf. Wesley R. Fishel, *The End of Extraterritoriality in China* 246, note 62 (1952).

³⁵ Act of Aug. 11, 1848, 9 Stat. 276, sec. 4. The Bill had referred to "the common law of the United States," which was changed to "the common law" after criticism in the Senate that ". . . it was well known that there was no such thing known as the common law of the United States." Senator Badger, April 19, 1848, 30th Cong., 1st Sess., Congressional Globe, Vol. 18, p. 649.

³⁶ Opinion of Sept. 19, 1855, 7 Op. Att. Gen. 495, 503, 504. Cf. *Forber v. Scannell*, 13 Cal. 242, 285 (1859) (determination of the American law in force in extraterritorial China).

³⁷ See questions by the World Court to U. S. Agent and Agent's answer, I.C.J. Pleadings, Morocco Case (*France v. U.S.A.*), Vol. II (1952), pp. 295, 335.

³⁸ Casablanca: in 1951, 22 civil and 75 criminal, in 1952 (first half), 35 civil and 74 criminal; Tangier: in 1951 and 1952 (first half), 14 civil and 30 criminal cases. Ministerial Court Tangier: 4 civil and 4 criminal appeals. I.C.J. Pleadings, Morocco Case (*France v. U.S.A.*), Vol. II (1952), p. 335.

³⁹ Jeremy Bentham, "Draught for the Organization of Judicial Establishments," in Bentham, Works (Bowring edition 1843), Vol. IV, p. 317.

⁴⁰ E.g., Ministerial Court, Tangier, May 8, 1940, 20 Gazette des Tribunaux du Maroc 157 (1940) (non-exercise of jurisdiction for status questions of Moroccan protégés). Cf. Consular Court, Tangier, Dec. 20, 1952, New York Times, Dec. 21, 1952, p. 1, col. 1 (conviction of one Paley for piracy).

domestic court for the effect to be given to it.⁴¹ Another source of information is the *Digests of International Law*. They refer to cases where some action was taken by the Department of State, as a result of a complaint or because a consular court had asked the Department of State for advice in a particular case. The items given in the chapter on extra-territorial jurisdiction in Hackworth's *Digest*⁴² well illustrate the breadth of the field of action of the consular courts. They involve, among other things, bankruptcy jurisdiction, probate matters, marriage, annulment and divorce, adoption, protection of the insane, and functions in lunacy cases in the private law field. Thorny conflicts questions arise and one case referred to in Hackworth's *Digest*,⁴³ may be mentioned.

An American protégé had obtained a judgment for a sum of money in the French court of first instance in Casablanca. The court of appeal at Rabat reversed, and this judgment was confirmed by the Court of Cassation in Paris. To obtain refund from the American protégé of the money he had obtained on the basis of the judgment of the court of first instance, a law suit was begun against him in the United States Consular Court at Casablanca. The Consular Court turned to the Department of State for advice on what effect to give to the decision of the court of appeal ordering the refund. The Department expressed the view (in 1932) that non-recognition of the conclusive effect of the decision of the French court, by applying the rule of reciprocity laid down in *Hilton v. Guyot*,⁴⁴ "should not tend to defeat the ends of justice." We are not told whether the Consular Court followed the advice. The consular courts are independent in the exercise of judicial functions.⁴⁵ *Hilton v. Guyot* was manifestly inapplicable to the case. By starting proceedings in the French courts the American protégé had submitted to their jurisdiction. The reproduction in Hackworth's *Digest* (published in 1941) of the advice given in 1932 appears doubly unfortunate considering the loss of importance⁴⁶ since *Erie R. R. Co. v. Tompkins*⁴⁷ of the much criticized *Hilton v. Guyot* as a precedent. We may add that, provided there is reciprocity,⁴⁸ foreign

⁴¹ In re Blanchard's Estate, 29 N.Y.S. 2d 359, 178 Misc. 796, 1941-1942 Annual Digest of Public International Law Cases 263 (Surrogate Court, 1941) (determination by Cairo Consular Court of next of kin of American there deceased); *Dored v. Wells*, 11 N.Y.S. 2d 258 (City Court, New York, 1939) (full faith and credit for Consular Court, Ethiopia, judgment); *Newman v. Basch*, 152 N.Y. Supp. 456, 89 Misc. 622 (same court, 1915) (Consular Court, China, judgment).

⁴² 2 Hackworth, *op. cit.* 493 *et seq.*

⁴³ At p. 589.

⁴⁴ 159 U. S. 113 (1895). Criticized in Joseph H. Beale, *Conflict of Laws* § 343.3 (1935); Herbert F. Goodrich, *Conflict of Laws* 605 (3rd ed. 1949). Not followed in *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926). See Willis L. M. Reese, "The Status in This Country of Judgments Rendered Abroad," 50 Columbia Law Review 783 (1950); Restatement, *Conflict of Laws* § 434, comment b (1934).

⁴⁵ 2 Hackworth, *op. cit.* 569.

⁴⁶ See Goodrich, *op. cit.* 607.

⁴⁷ 304 U. S. 64 (1938). Followed by *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941). See Paul A. Wolkin, "Conflict of Laws in the Federal Courts," 3 Syracuse Law Review 47, 50 (1951).

⁴⁸ Cf. Arthur Lenhoff, "Reciprocity: The Legal Aspect of a Perennial Idea," 49 Northwestern University Law Review 752, 760 (1955); Kurt H. Nadelmann, "Re-

judgments of Powers having given up extraterritorial rights are recognized to be conclusive as to the merits in the French⁴⁹ and Spanish⁵⁰ Zones of Morocco. In the International Zone, final judgments of Powers signatories of the Act of Algeciras of 1906 are executed as of right against persons subject to the jurisdiction of the International Jurisdiction, provided they are not contrary to the public policy of the Zone.⁵¹

How many other intricate problems does a consular court encounter—problems a metropolitan court with proper library facilities and a competent Bar would have difficulty in solving? The American law which the consular courts have to apply includes the rules of conflict of laws.⁵² Often these rules will refer to other than American law, especially in cases of extended consular jurisdiction. The consul, with his American associates, will have to hear testimony on foreign law to apply it to the facts of the case. This should not be particularly easy.

Commenting on the consular courts which had kept criminal jurisdiction in Egypt, a distinguished American jurist with long service on the now defunct Mixed Courts of Egypt, once said:

The exercise of the judicial function is always a serious and delicate business. It should not be undertaken sporadically by a non-professional judge, however able and upright he may be. It is indeed a tribute to the good sense and efficiency of the consular officers that such a patchwork judicial machinery has been able to meet the practical situations as they have arisen.⁵³

It is well known that many of the civil cases are settled out of court, thanks to the good offices of the consular courts.⁵⁴ How well the judicial functions are otherwise fulfilled remains a secret to the public at large.⁵⁵ Concern will not altogether be removed by meritorious pronouncements like

prisals Against American Judgments?''', 65 *Harvard Law Review* 1184 (1952), 10 *Revista de Derecho Procesal* (Spain) 573 (1954).

⁴⁹ Dahir of Aug. 12, 1913, on Civil Status of Frenchmen and Foreigners in the French Protectorate, Art. 19. P.-Louis Rivi re, *Trait  du Droit Marocain* 349 (1948); Alphonse M nard, *Trait  de Droit International Priv  Marocain* (1935), Vol. I, p. 127.

⁵⁰ Dahir of June 1, 1914, Art. 24. Julian G. Verplaetse, *Derecho Internacional Privado* 719 (Madrid, 1954).

⁵¹ Dahir of June 10, 1953 (note 17 *supra*), Art. 28. Exequatur by the Court of Appeal is necessary. See Werner Goldschmidt, *Sistema y Filosof a del Derecho Internacional Privado* (2d ed. Buenos Aires, 1954), Vol. III, p. 219; A. L aud, "Les effets internationaux des jugements dans la Zone de Tanger," 6 *Revue Marocaine de Droit* 399 (1954).

⁵² *Doong Nyi Association v. Grew*, 2 *Extraterritorial Cases* 102, 104 (U. S. Court for China, 1921).

⁵³ Jasper Y. Brinton, *The Mixed Courts of Egypt* 293 (1930).

⁵⁴ Encouragement of settlement by mutual agreement or submission to arbitration is prescribed. 22 U.S.C.   161 (1952).

⁵⁵ Few complaints received are disclosed. 2 Hackworth, *op. cit.* 569, refers to an instance where investigation was refused because of finality of the adjudication by the consular court. For cases brought up in the proceedings before the World Court, see I.C.J. Pleadings, *Morocco Case* (France v. U.S.A.), Vol. I, p. 211 (*C.F.M. v. Kirk*: question of jurisdiction when defendant had departed from Morocco); p. 222 (*Shores v. Amat*: enforcement of maintenance order).

the one reproduced in Hackworth's *Digest*, taken from an opinion of the Minister in Tangier in a case where he issued a writ of certiorari to the Consular Court at Casablanca:

While the Supreme Court of the United States has held that the Constitution of the United States does not, of its own force, operate in foreign countries and has expressly declared inapplicable to extra-territorial countries [*sic*] certain provisions of the Constitution, no Court of the United States has ever questioned the right of American citizens in extraterritorial countries to due process of law whether as a constitutional provision or as a natural right under the system of laws administered by the United States.⁵⁶

Indeed, a Bill of Rights has generally been granted to unincorporated Territories, but happily American legal tradition does not leave to *ad hoc* courts, working without the benefit of an adequate Bar, final determination of what constitutes due process of law.⁵⁷ It may indeed be asked whether a judicial system as primitive as that of American consular courts is compatible with due process of law at places where local conditions do not prevent a more advanced system of judicial administration. And the selection of American citizens as associates, without accommodation for cases where only one side is American, raises the question of fairness.⁵⁸ Application today of legislation passed in 1860 for the administration of justice at locations as accessible as many parts of the United States and its Territories has no justification.⁵⁹

Most objectionable and, at the same time, easiest to change, is the absence of the possibility of a recourse to the regular courts. As early as 1870, Congress created the possibility of an appeal from the Consular Courts in China to the Circuit Court of California.⁶⁰ Today we have appeals to the United States Courts of Appeals from such distant territorial courts as those of Alaska, the Canal Zone, Guam, and the Virgin Islands.⁶¹ Appeal from consular court decisions to the nearest United States Court of Appeals should be permitted as a first and immediate step toward a

⁵⁶ 2 Hackworth, *op. cit.* 611 (*Marcos Toledano v. Haim Toledano*, May 20, 1936).

⁵⁷ Compare the care with which the U. S. courts were set up in occupied territory during the war. Cf. Eli E. Nobleman, *American Military Government Courts in Germany* (1950).

⁵⁸ Before the International Jurisdiction, the jury in criminal cases is composed of three members of the nationality of the indicted and of three members of other nationalities. Dahir of June 10, 1953 (note 17 *supra*), Art. 15. In the French Zone, the assessors in criminal cases are three French and three persons of the nationality of the indicted. Dahir of Aug. 12, 1913, on Assessors in Criminal Matters, Arts. 7 and 11. Caillé, *op. cit.* 156.

⁵⁹ Law reform had been urged upon Congress during the administration of President Arthur. Hinkley, *op. cit.* 75; 1 Wharton, *Digest of International Law* 814 (1887). For China the situation improved with the creation in 1906 of the United States Court for China. See Crawford M. Bishop, "American Extraterritorial Jurisdiction in China," 20 A.J.I.L. 281 (1926).

⁶⁰ Act of July 1, 1870, 16 Stat. 183. Chester L. Jones, *The Consular Service of the United States* 56 (1906). Cf. Henry Wheaton, *Elements of International Law* 109 (1836).

⁶¹ 28 U.S.C. (1954 Supplement) §§ 41, 1252, 1291, 1292, 1294.

complete overhauling of the consular court system. Nor should this be postponed on the argument that the consular courts are doomed to disappear sooner or later; the example of Morocco shows that the courts are still sufficiently alive to be able to create political, social, and legal problems of the first order.

This brings us back to Morocco and the special situation in the International Zone. Though a signatory of the Act of Algeciras of 1906, the United States never acceded to the Paris Convention of 1923 which organized the International Zone of Tangier, including its court system.⁶² One of the consequences was non-representation of the United States on the Mixed Court of the Zone. Changes have occurred since the end of the second World War, during which Spain occupied the Zone. As a result of a joint invitation from the French and British governments to participate in the provisional international regime created by a Franco-British Agreement of August 31, 1945,⁶³ the United States has taken its seat on the Committee of Control, governing body of the Zone, which is composed of the consuls at Tangier of the Powers signatories of the Act of Algeciras. As a consequence of the same agreement, three residents of American nationality are members of the International Legislative Assembly of the Zone.⁶⁴ More recently, the United States Government adhered, with reservations, to a multilateral convention of November 10, 1952,⁶⁵ implemented by Dahir of the Sultan of Morocco of June 10, 1953,⁶⁶ earlier mentioned, reorganizing the court system of the Zone and creating, among other things, a place for an American judge on the reorganized International Jurisdiction. The reservations are that the extraterritorial jurisdiction of the United States remains unaffected by its adherence, and that the latter does not imply adherence to the Statute of Tangier of 1923, as modified in 1928.⁶⁷ Since the end of 1953 an American national has been among the twelve judges of the International Jurisdiction.⁶⁸

⁶² For the reasons of non-accession, see 2 Hackworth, *op. cit.* 509; Stuart, *op. cit.* 221.

⁶³ See Arts. 3 and 7 of the Franco-British Agreement of Aug. 31, 1945, for the Re-establishment of the International Administration of Tangier. British Treaty Series No. 24 (1946); T.I.A.S. No. 2752, p. 9; 9 Hudson and Sohn, *International Legislation* 653 (1950).

⁶⁴ *Ibid.* Cf. Art. 2 of the Amendment of Nov. 10, 1952, to the Franco-British Agreement, T.I.A.S. No. 2752.

⁶⁵ Convention between France, Great Britain, Italy, and Spain of Nov. 10, 1952, relating to the Reform of the International Jurisdiction of the Tangier Zone. Text and translation in T.I.A.S. No. 2893. Belgium, The Netherlands, Portugal, Sweden, and the U. S. have adhered to the Convention. T.I.A.S. No. 2893, p. 47.

⁶⁶ Note 17 *supra*.

⁶⁷ Note of the American Embassy to the French Ministry of Foreign Affairs, dated Paris, July 8, 1953, T.I.A.S. No. 2893, p. 46. Respecting compatibility of reservations, see Advisory Opinion on the Reservations to the Genocide Convention, [1951] I.C.J. Reports 15; G. G. Fitzmaurice, "Reservations to Multilateral Conventions," 2 *International and Comparative Law Quarterly* 1 (1953); Charles G. Fenwick, "Reservations to Multilateral Treaties," [1950-1951] *Inter-American Juridical Yearbook* 37 (1953); Note, 4 *Buffalo Law Review* 222, 229 (1955).

⁶⁸ Juan A. A. Sedillo, nominated by Dahir of Oct. 27, 1953, Tangier Zone Official Bulletin No. 486 of Nov. 15, 1953. Judge Sedillo was sworn in on Nov. 17, 1953, and

They are nominated by Dahir of the Sultan, rendered at the request of the Committee of Control, to which the candidates are presented by the respective governments.⁶⁹

Against this factual situation, which is not devoid of originality, the continued exercise by the United States of extraterritorial rights in the International Zone must be considered. In the International Zone, there are now the following courts: (1) for the Moroccan population, the Shereefian courts—the Court of the Chrâa, the court of the Mendoub, and the Rabbinical court;⁷⁰ (2) the Consular Court of the United States, with the extended extraterritorial jurisdiction;⁷¹ (3) the International Jurisdiction, with jurisdiction in all matters involving a foreigner except, under the ruling of the *Mackay Radio and Telegraph Company* case, when the defendant is a citizen or a protégé of the United States; (4) a special tribunal for questions involving the State Bank of Morocco, the Swiss Federal Tribunal being the appellate jurisdiction.⁷²

The dissent filed in the case before the World Court, signed by Judge Hackworth and three of his colleagues, includes this passage:

There is hardly any one to-day who will question the general proposition that what is known as the capitulatory regime is an anachronism which should be brought to a speedy end, wherever it exists. In fact the United States Government itself has at all times been ready to negotiate with both France and Morocco a new arrangement or agreement "to replace and recast in a form more properly adapted to present circumstances the treaty bounds originally contracted with the State of Morocco." (Rejoinder, page 43.)⁷³

For the International Zone, which has an international court, with an American serving on it, and an international Bar, open to our lawyers,⁷⁴ no protracted negotiations are needed to correct an undesirable situation. Following the precedent set three-quarters of a century ago in the case of the Mixed Courts in Egypt,⁷⁵ the exercise of extraterritorial rights in the International Zone should be suspended in favor of the International Jurisdiction.

Treaty rights should not be given up lightly, especially in the case of

assigned to the criminal court by the general assembly of the judges. *Astrea* (Tangier), No. 34 of Jan. 1954, p. 3, col. 2.

⁶⁹ Art. 3 (4) of the Dahir of June 10, 1953 (note 17 *supra*), identical with Art. 3 (4) of the Convention of Nov. 10, 1952, note 65 *supra*.

⁷⁰ See Paul Deeroux, "Organisation judiciaire de la Zone de Tanger," 8 *Revue Juridique et Politique de l'Union Française* 380, 387 (1954).

⁷¹ Not extending to questions of title to real property and of status under Moslem law. Statement of U. S. Agent, I.C.J. Pleadings, Morocco Case (France v. U.S.A.), Vol. II, p. 335.

⁷² Under Art. 45 of the Act of Algeciras of April 7, 1906, U. S. Treaty Series 456, 34 Stat. 2905.

⁷³ [1952] I.C.J. Reports 215; 80 *Clunet* 771. See I.C.J. Pleadings, Morocco Case (France v. U.S.A.), Vol. II, p. 130.

⁷⁴ See Art. 45 of the Dahir of June 10, 1953 (note 17 *supra*), Art. 45 of the Convention of Nov. 10, 1952, note 65 *supra*.

⁷⁵ Act of March 23, 1874, 18 Stat. 23; Act of March 27, 1876, 19 Stat. 662; 22 U.S.C. § 182.

Protectorates,⁷⁰ but the continued exercise of consular jurisdiction, limited or extended, at places where the court system made available provides full guarantees, is hardly justifiable. And the result is particularly undesirable when the American consular court system is not up to date. For the International Zone it would seem clear that the interests of the United States will be best served by a suspension of its rights in favor of the International Jurisdiction. The continued exercise of limited extraterritorial rights in the French Zone and of extended extraterritorial rights in the Spanish Zone likewise calls for review by the United States Government. And as far as the protégé system is concerned, may not a quick private burial by administrative action commend itself?

⁷⁰ Even for the French Zone it can be argued that the renunciations were conditioned upon existence of courts as created by the Dahirs of 1913. See Dissenting Opinion [1952] I.C.J. Reports 225; 80 *Clunet* 783 (1953); Paul Decroux, *De l'Application des Lois Nationales au Maroc* 19 (Paris, 1955).

THE SOVIET INTERPRETATION OF INTERNATIONAL LAW

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1. DISCUSSION OF THE THEORY OF INTERNATIONAL LAW

The five issues of *Sovetskoe Gosudarstvo i Pravo* which are here reviewed (Nos. 6, 7 and 8 of 1954, and Nos. 1 and 2 of 1955) contain a series of articles devoted to a discussion of the basic notions of international law. This discussion is related to the preparation of a new textbook for Soviet law schools the completion of which this year has been announced by the A. Ya. Vyshinsky Institute of Law, a branch of the Soviet Academy of Sciences.

Professor Korovin has inaugurated the discussion in his article, "Some Fundamental Questions of Contemporary International Law" (No. 6, pp. 34-44, October, 1954). He begins by examining an ever-recurring scholastic problem which must be a nightmare to Soviet lawyers, namely, what economic basis to assign to international law which is binding on both the capitalist and the socialist states. A non-Marxist who does not need to worry about such problems should be reminded that Marxists believe that the economic basis (system) of each society predetermines the nature of its own superstructure (philosophy, religion, ethics, literature, arts, music, science, etc.). This superstructure includes law. Thus national law is determined in its contents by the economic basis of a given society. However, international law simultaneously serves societies founded on the two different economic bases: the capitalist and the socialist. What to do with this undisciplined law which refuses to take its place within the Marxist doctrine? Professor Korovin applies himself to this ungrateful problem and enumerates the five solutions proposed by his colleagues and himself: (1) It is a coincidence that two different bases have produced the same rules of international law (This was his own former view formulated in 1951, but he rejects it in the present article (p. 34) because: "there can be no complete coincidence or identity in the superstructural forms which qualificatively correspond to different bases"); (2) Contemporary international law is entirely a product of the capitalist basis (Then would it bind the states founded on the socialist basis?); (3) It is a socialist law (Why then was it known to the capitalist societies before the October Revolution?); (4) It is composed of inter-class, hybrid rules produced by both economic bases (This interpretation is obviously heretical and un-Marxist); (5) It does not form a part of any superstructure and is independent of any basis (This particular view follows Stalin's Gordian solution for a similarly difficult problem of the place of language in the Marxist theory, but a Soviet lawyer cannot pretend to solve scholastic

questions in the Stalinist peremptory manner). Professor Korovin rejects all five solutions, because he argues, with some logic:

All such discussions lead by logical necessity either to a juristic nihilism and the denial to international law of any legal significance and force or to a revision of the Marxist-Leninist teaching concerning state and law. (p. 35.)

A revision of the Marxist-Leninist doctrine would be an intolerable deviation which only Stalin could afford, while neither Marx nor Lenin nor the Soviet Government has ever denied the obligatory force of international law.

Professor Korovin tries to find a way out by adding a new interpretation to his own former views which he repudiates on one page of his article and calmly re-introduces on the following page. He says: "[the rules of international law] are parts of both superstructures, the capitalist and the socialist" (p. 35). He points, not without reason, to other similarities between the two legal superstructures, namely, to criminal law, which forbids the same common crimes in both types of societies. He adds, however, a new interpretation to prove that these similarities are in fact only superficial and the two legal superstructures remain different. He says that the basic difference consists in the dissimilar purposes served by apparently similar legal rules.

The age-old rules: "Do not kill" or "Do not steal" exist in the feudal, bourgeois and socialist codes but for different reasons in each case; they defend different class interests and serve different class purposes. The same is true of the generally recognized rules of international law. (p. 35.)

By introducing in the discussion motives and purposes he has confused policy with law and thus has by-passed his main question as to whether an economic basis creates its own peculiar law. Moreover his own theory of motives and purposes (legal policies) is also far-fetched. Is there truly any difference between the capitalist and the socialist motives and purposes insofar as the prohibition of common murder or the protection of *private* property (except for the means of production) is concerned? As a matter of fact the private property of Soviet citizens is more severely protected by Soviet criminal codes than is property in many capitalist states. The same argument applies to international law. Professor Korovin concedes that its legal institutions are the same for both types of societies. The same could be said of their purposes, at least in many cases, like diplomatic immunities, maritime law, etc.

Actually Professor Korovin adduces only one example for his theory of motives and purposes, namely, the recognition of new states. He says that the socialist states immediately grant recognition to a new state because of their respect for national self-determination, while the capitalist states delay recognition to safeguard their former financial and commercial privileges. "The motives and purposes of recognition are completely different, but the legal institution of international recognition remains the same." (p. 35.)

While trying to reconcile the objective existence of international law with the integrity of Marxist doctrine, he unintentionally denudes the concept of the superstructure of its meaning. He acknowledges that not only international law or other branches of law but also some other elements of the superstructures may be identical despite the difference in the nature of their respective economic bases:

We may incidentally observe that the same elementary or generally recognized rules which appear in different superstructures may be detected not only in the realm of law but also in other superstructural phenomena, for instance the moral rules. (p. 35.)

If he had had the courage to add arts, music and literary forms which remind one in the Soviet Union of the Western (capitalist) nineteenth-century standards, he would have completely demolished the Marxist deterministic relationship between the economic regime of a society and its so-called superstructure.

He goes on to make another rather un-Marxist claim that international law, initially a part of the capitalist superstructure, has now lost contact with its original economic basis and has been somehow miraculously grafted on the socialist basis:

One must admit that generally recognized international law, which basically developed during the pre-imperialist period, is ceasing to a large extent to fulfill its active superstructural role in respect to the contemporary capitalist basis because of the modifications in the nature of the latter basis (the transition from "free" capitalism to imperialism). In consequence contemporary imperialist international law doctrine and practice are increasingly being transformed into a theory and a practice of international arbitrariness and lawlessness. . . . These rules [of international law] constantly are losing their useful function for one of the two bases (in this case: the contemporary capitalist basis) and continue to perform this function for the other basis (the socialist). (p. 36.)

This statement should have led to the conclusion that international law is practiced only by the socialist states, but Professor Korovin hastens to moderate his view:

However, it would be incorrect to assume that the generally recognized rules of international law have now lost all practical meaning for the bourgeois states and have become for them some sort of a historical relic. Actually, even without mentioning the fact that the leading imperialist states (for instance, the United States) are sometimes compelled to make appeal to these rules in the defense of their own interests, it would be deeply erroneous to assume that Germany (Western), England, France, Italy and Japan will endlessly and humbly continue to tolerate American mastery and oppression and will not try to escape from American servitude and take the road of their own independent development. This means that many states, even the bourgeois, will seek and find the bulwark for their struggle against the American yoke in the generally recognized principles of international law and will fight for the realization of these principles in practice. (p. 37.)

The second perennial problem to which Professor Korovin devotes attention is the existence of a new branch of international law—the socialist law—which is supposed to co-exist with general international law and to be practiced in the mutual relations among socialist states. Professor Korovin thinks that this socialist international law was born by the end of the second World War when other socialist states appeared beside the Soviet Union. The author does not deny that “the old rules [of general international law] frequently are applied in the mutual relations among the states of the socialist camp” (p. 41), but he fails to adduce any convincing examples of a new and distinct socialist law. When he mentions such socialist practices as treaties of mutual assistance, commercial cooperation, exchange of scientific information, etc., he refers to practices also known to the capitalist states.

Having admitted the existence of one generally recognized international law equally binding on all states regardless of their economic system, Professor Korovin is confronted with another scholastic difficulty, namely the Marxist tenet that each law expresses the will of the class ruling a given society. Which class, the capitalist or the proletariat, does express its will in this hybrid international law? He answers that both do and proceeds to define international law as:

A complex of rules which regulate the relations among states, while states uphold, which develop through the process of international cooperation or struggle among states, and which serve the material and spiritual [*sic!*] needs of the states in the interest of the respective classes ruling in these states. (p. 42.)

This lengthy and foggy definition will hardly help Soviet international lawyers.

The final problem examined by Professor Korovin concerns sovereignty. Facing the classical Soviet definition of sovereignty as the condition of complete independence in the domestic and external affairs of the state, he says: “. . . this ‘condition of independence’ does not in fact exist during the period of imperialism insofar as the majority of states and nationalities are concerned.” To avoid the difficulty of reconciling the Soviet definition of sovereignty with actual situations he substitutes the discussion of sovereignty of the nationality for that of state sovereignty, a subterfuge for which he has been duly criticized in other articles of the same series. He says: “Sovereignty is the right to independence, autonomy, and supreme power.” (p. 43.) This right belongs to all nationalities, even those which are dependent and have no state of their own. Sovereignty thus becomes a slogan of self-determination and loses its legal meaning as an attribute of statehood.

Another Soviet Professor, S. B. Krylov, continues the discussion in the article, “A Contribution to the Discussion of Questions of the Theory of International Law” (issue No. 7, pp. 74–79, November, 1954). Professor Krylov does not waste his time on the question of the place of international law in the theory of basis and superstructure or on the nature of the new socialist international law. He seems to be mainly interested

in positive international law which is practiced, according to him, among states of the different or the same social regimes. He has the courage to say: "The assertion that international law is not practiced in the mutual relations among the capitalist states is an over-simplification of reality" (p. 74). Unlike Professor Korovin he makes the distinction between the sovereignty of the state and that of the nationality which may oppose each other in a multinational state or in a dependent territory. A dependent nationality transforms its national sovereignty into state sovereignty only when it is freed from foreign control and forms its own state (p. 76).

He accepts the existence of two kinds of subjects of international law: states and dependent nationalities which are subjects of international law in their own right before even attaining the status of their own statehood (p. 76). He seems to grant to the latter subjects of international law only one right, namely, that of self-determination. He follows the general Soviet view in denying to the individual and to international organizations the quality of subjects of international law, and says that states themselves would be the subjects of international agreements concerning human rights, while the protected individuals would remain passive recipients of the benefits resulting from such agreements (p. 77).

Professor Krylov submits interesting views concerning the sources of international law which he classifies as follows: 1. First and foremost, international treaties; 2. International customs; 3. Generally recognized principles of international law; 4. Decisions of international organizations, if they are truly binding decisions.

He mentions as examples of the fourth source: the decisions (as distinguished from recommendations) of the Security Council if adopted with the concurring votes of its permanent members; the rules of procedure of the various organs of the United Nations and the specialized agencies, which rules are binding even on the minority which voted against their adoption, if the minority states made no express reservations; and the rules of procedure of the International Court of Justice which are obligatory for the judges and the states appearing before the Court (p. 78). Professor Krylov firmly holds that these various international decisions represent "a distinct source of international law" (p. 79).

Referring to the relation between international and municipal law he rejects the primacy of the former, and yet seems to accept it implicitly in the following sentence:

However, an existing rule of international law (first of all a treaty rule which has been expressly accepted by a given state) may not be rejected by a state because it contradicts a rule of its domestic law. To say the opposite would mean to deny the legal force of international law. (p. 79.)

A less-known lawyer, V. M. Shurshalov, in "Some Questions of the Theory of International Law" (issue No. 8, pp. 89-92, December, 1954), brings some common sense to this whole discussion and takes issue with Professor Korovin on two points: (1) that capitalist states cease to find

any use in international law; (2) that one should define the place of international law within the Marxist theory of the basis and the superstructure. Concerning the first point he openly says:

One can hardly agree to the full extent with this proposition of Professor E. A. Korovin. . . . An absolute majority of the countries of the world are vitally interested in the observance of international law and in the co-operation of all states regardless of their social regimes . . . the rules [of international law] equally serve all states whatever their social system might be. (pp. 91-92.)

No less sensible are his observations concerning the other point:

Such a discussion diverts the attention of scholars from the important task of clarifying the nature of international law. . . . The debate concerning an autonomous basis of international law seems to us both purposeless and profitless from the point of view of the development of the doctrine of international law. (p. 91.)

The article which probably represents the final views on the matter is the one written by V. V. Evgenyev under the title, "Subjects of Law, Sovereignty and Non-Interference in International Law" (issue No. 2, pp. 75-84, March, 1955). The author says: "This article has been written on the basis of a corresponding chapter in the textbook of international law which the A. Ya. Vyshinsky Institute of Law of the Academy of Sciences of the U.S.S.R. is preparing." Judged by this, and articles previously discussed, the fundamental doctrinal views have remained practically unchanged. "[The State] is the only subject of international law." This initial assertion eliminates international organizations and individuals from among the subjects:

. . . neither international organizations nor *a fortiori* physical persons are subjects of international law. Their inclusion among the subjects of international law would contradict the very nature of this law which is an inter-state law destined to regulate the relations among states on the basis of their sovereign equality. (p. 75.)

However, the author concedes some sort of rights to international organizations:

The rights of any international organization are founded on agreements concluded among states and thus are derived from the rights of states. . . . International organizations function within the limits of their jurisdiction which is defined in their charter signed by the states which have founded the organization. (*ibid.*)

This is true, but it would be no less true to say that private law corporations derive their rights from the charters established by natural persons. Yet Soviet lawyers do not deny the existence of corporations as distinct juristic persons and subjects of municipal law. For instance, a collective farm is such a person under Soviet law, and its members (the peasants) are often warned not to confuse their own rights and properties with those of the collective farm. It is hard to understand why Soviet lawyers refuse to see an analogous relationship between the state-members and international organizations. The author writes, however:

This is why, for instance, one cannot accept at all as correct the Advisory Opinion of the International Court of Justice of April 11th, 1949, which recognized the United Nations as a subject of international law. (p. 76.)

It is easier to understand why Soviet lawyers refuse to admit individuals to be subjects of international law. One of the reasons lies in the very nature of the regime with its subordination of the individual to the state, and another may relate to the concept of an international guarantee of human rights. The author seems to make an allusion to the latter reason in the following sentence:

The attempts of particular bourgeois authors to grant, under contemporary circumstances, to physical persons the capacity of subjects of law aim at creating a doctrinal basis for the policy of interference in the domestic matters of other states, which policy the aggressive circles of the imperialist states support. Opposing the physical person to the state, these authors try to reduce the importance of the state, to limit its sovereign rights and to picture the relations between the state and its citizens in their international aspect as being the relations between equal subjects of law. (pp. 75-76.)

The author denies the existence of any truly federal bourgeois states. This view is expressed also in other articles more specifically devoted to the United States (see below, p. 532). For a rather mysterious reason the Soviet lawyers have ranged themselves among the defenders of States' rights against what they call the encroachments of the United States Federal Government, and greatly deplore the modern American trend towards an extension of Federal activities, not excluding the New Deal period:

Such a bourgeois state as the United States, which continues to be called a federal one, is actually a unitary state, because it is founded on the administrative principle [of subdivision] but not on the nationality principle. . . . An analogous situation exists in other bourgeois federations. (p. 76.)

The U.S.S.R. is the only true federal state:

The Soviet Union as a whole and every Union Republic in particular are autonomous subjects of international law with all the rights and obligations towards other states which derive from this status. . . . Union Republics, as the Soviet Union as a whole, are truly sovereign states. (*ibid.*)

Most Soviet lawyers, unlike Professor Korovin, distinguish between the two sovereignties: of the state and of the nationality. National sovereignty is a sort of an inchoate right which is realized through self-determination and becomes a perfect right when a nationality forms its own state and the sovereignty of the nationality merges with that of the national state. However, V. V. Evgenyev thinks that only a state may be the subject of international law, while

. . . a nation, which has not yet created its own independent state or seceded into such a state, may not be recognized as a subject of inter-

national law, because the lack of any public authority deprives the nationality of the capacity for contracting international obligations and guaranteeing their fulfillment. (p. 77.)

After this statement, which contradicts Professor Krylov's views, the author hastens to add a reservation to safeguard the practical Soviet need of supporting the anti-Western colonial movements:

However it is impossible to deny to a nation recognition as a subject of international law, if this nation fights for the formation of its own state. One must bear in mind that the practical question of recognition will arise only after the nation concerned acquires some features of the state and forms some sort of a definite organ (national committee, etc.) which acts in this initial period on behalf of the nation and conducts, of course, the policy of the ruling class of that nation (*ibid.*)

The author maintains the well-known Soviet thesis that state sovereignty represents the cornerstone of international law:

State sovereignty is the independence of the state of any other state; this independence amounts to the right to decide freely and according to its own judgment all its domestic and foreign affairs without interference on the part of other states. State sovereignty embodies the right to self-determination, the latter being the right to decide freely all questions relating to the national fate without, however, infringing in any way upon the rights of other nations. A nation has the right to choose autonomy as a form of its statehood or enter with other nations into a federation or finally to secede completely because each nation is sovereign and all nations are equal. Consequently state sovereignty in its modern sense is founded upon the sovereignty of the nation. (*ibid.*)

However, state sovereignty is not understood as the right to do everything. Soviet lawyers re-introduce the old theory of auto-limitation without mentioning its original authors:

The decisive importance of the principle of sovereignty for the development of inter-state relations does not at all carry with it the implication that the state is "absolutely sovereign" in its foreign relations and may act arbitrarily in relation to other states without paying any attention to the generally recognized principles of international law and freely accepted international obligations. . . . Thus a limitation of sovereignty, if it is of a mutual and voluntary nature, is not only possible but indispensable, because without such limitation diplomatic, economic and cultural relations could not develop among states. (p. 78.)

Although each state has the right to full sovereignty, not every state enjoys this status:

In practice some states fully realize their rights, while the others, sometimes are deprived of this capacity, because they are dependent to a higher or lesser degree on other states. In some cases this dependence is of a purely factual nature, if one state is compelled by its economic or political situation or by other reasons to make concessions out of its sovereign rights and to comply with the will of another state temporarily stronger. In these cases the dependence is

manifested in the acts of the dependent state which formally continues to be considered as a sovereign state. (p. 79.)

Forgetting the Soviet satellite states, the author detects the existence of such a dependence of fact in other quarters, and cites as examples the countries friendly to the United States, including Britain and France: "... States which have consented to receive American assistance quickly lose their sovereign rights and independence and are leveled down to the position of vassals of American imperialism." (p. 80.)

The author quite correctly observes: "... respect for the sovereignty of all states and an unconditional observance of the principle of non-interference are the political foundations of a peaceful co-existence between the countries of socialism and those of capitalism." (p. 81.) He points to the fact that it was the French Revolution which first proclaimed the principle of non-interference, and adds that the same Revolution was quick in repudiating this principle in its own external actions. Although the record of the Bolshevik Revolution and regime is no better, he holds only the United States and other capitalist Powers responsible for interfering in the affairs of other states. Without realizing that he is talking about authors who are not alive, he accuses L. Oppenheim, whom he believes to be responsible for the new editions of his textbook, and C. C. Hyde of "justifying the refusal of the ruling upper circles of the imperialist states to abide by the traditional and generally recognized principles of international law and in particular that of non-interference in the domestic matters of other states." (p. 84.) But even a doctrinal article on international problems would not be complete without its share of anti-Western and, in particular, anti-American abuse. One may quote another sentence from the same article which had hardly if any connection with the author's main argument: "American imperialists unleashed a cruel war against the freedom-loving Korean nation . . . and used the vilest and most abject means of mass destruction of human beings: the bacteriological weapon. . . ." (p. 83.)

Another article of the same series appeared in issue No. 1 for February, 1955. Written by L. A. Modzhoryan under the title: "The Notion of Sovereignty in International Law" (pp. 68-76), it begins by accusing American, French and Belgian lawyers of deliberately attempting to subvert the independence of states for the benefit of American imperialism through their revision of the traditional concept of sovereignty. The author makes the same distinction between state and national sovereignty as V. V. Evgenyev has done and continues:

The struggle of nationalities for the realization of their national sovereignty does not need to take the form of a struggle for an independent state, *i.e.*, for state sovereignty . . . a nationality may just as well express the wish to be included in a multinational state as a member of a federation or as an autonomous unit. (p. 70.)

If one remembers that the Soviet Union is, according to Soviet lawyers, the only existing true federation, he will see the point of the observation concerning the alternatives to an independent state. The U.S.S.R. has

not only solved "satisfactorily" the problem of self-determination for her numerous component nationalities, but might be willing in the future to offer the same alternative to other ethnic groups which the Russian Communists might intend to include within the frontiers of the Soviet state.

Soviet writers must have a Freudian sense of freedom from any guilt complex. This particular author innocently quotes Robespierre: "People who oppress even only one nation are the enemies of all nations" (p. 71), and Lenin, who defined in October, 1917, a just and democratic peace as being "a peace without annexations (*i.e.*, without conquest of foreign territories and forcible annexation of foreign nationalities) and without contributions" (p. 72). Judged by the Soviet insistence on annexations and reparations during the last sixteen years, Soviet policy has not been too faithful to these Leninist ideas. As though forgetting the existence of the satellite countries, the author goes on with his excerpts. After quoting the following promise from the Yalta Declaration on liberated Europe, "the restoration of sovereign rights and self-government to those peoples which have been forcibly deprived of them by the aggressor nations" (p. 73), he comments: "History proves that oppressed nations always rise up sooner or later against the foreign yoke." (p. 75.) Thinking of the Western Powers but of course not of the U.S.S.R., he writes: "Widely spreading is the imperialist practice of installing puppet governments, creating puppet states, initiating civil wars and organizing military interventions. . . ." (p. 74.)

This author, like his colleagues, approvingly mentions the five principles which India and the People's Republic of China adopted in June, 1954: "1. Mutual respect for territorial integrity and sovereignty; 2. Non-aggression; 3. Non-interference in the domestic affairs of one another; 4. Equality and mutual benefits; 5. Peaceful co-existence." (p. 76.) Peaceful co-existence could certainly last on the basis of respect for these five principles, if only a sixth one were added: strict reciprocity.

2. THE GENEVA CONVENTIONS

Issue No. 7 carries an article by A. Latyshev on "The Geneva Conventions of 1949 concerning the Protection of War Victims" (pp. 121-125). It was written because of the ratification of the four Geneva Conventions on April 17, 1954, by the Presidium of the Supreme Soviet of the U.S.S.R. It is interesting to note these features of the conventions which the Soviet commentator deems to deserve especially favorable mention:

1. The inclusion by the Third Convention within the category of war prisoners of "personnel of partisan detachments and of organized resistance movements operating on their own territory, even if the latter were occupied, or outside of that territory," and "crews of commercial vessels and civil aircraft, personnel of labor battalions and services, and personnel of the regular armed forces, who owe their allegiance to govern-

ments or authorities which are not recognized by the state which has taken them prisoners of war." (p. 122.)

2. The protection afforded to the civilian population of the belligerent countries by the Fourth Convention, including the prohibition of murder, torture and cruelty, expulsion of civilians from occupied territory, and of any aimless destruction of property in the occupied territory. (*ibid.*)

3. The prohibition by the Geneva Conventions of any discrimination because of the race, color, nationality, language, political or religious beliefs, social origin or material position of the persons protected by the conventions. (*ibid.*)

4. The extension of the benefits of the conventions to persons involved in civil and colonial wars. "This provision is new not only for the Geneva Conventions but also for international law as a whole. . . . International law heretofore did not contain any rules concerning the conduct of civil or colonial warfare. This question was usually considered as being included within the exclusive jurisdiction of the states concerned." (p. 123.)

5. The applicability of the conventions to any hostilities between the contracting parties, even if one of them should deny the existence of a state of war (p. 123).

6. The applicability of the conventions in the mutual relations of the contracting parties if one of the belligerents is not a party to the conventions, and in the case where one of the belligerents is not a contracting party but applies the provisions of the conventions (pp. 123-124).

7. The applicability of the conventions to a territory occupied without any armed resistance (p. 124).

The Soviet commentator is critical of other features of the conventions, namely:

1. That a person suspected of hostile activities against the occupying Power may be deprived of the benefits of the Fourth Convention (p. 124).

2. That a belligerent Power may ask a third state or an impartial humanitarian agency to take over the functions of the Protecting Power if the enemy citizens are not protected by any third Power selected by their own state. The commentator objects to the selection of a Protecting Power or agency without the assent of the enemy state concerned. (*ibid.*)

3. That a contracting party may be freed from its obligations upon the transfer of the persons protected by the Third Convention to a third Power, party to the convention. The Soviet lawyer objects that such persons may be transferred to a third state without the assent of their own country. (*ibid.*)

4. "Article 85 of the Third Convention contains a provision which concedes to war criminals taken prisoners of war the same privileges and benefits which are reserved for other prisoners of war. This provision undoubtedly depreciates the humanitarian value of the Convention on Prisoners of War and may be significantly used for protecting war criminals." (pp. 124-125.)

The Soviet Union made reservations at the times of signature and ratification of the Geneva Conventions concerning all the above four points.

The author notes with visible satisfaction that "A number of participants in the North Atlantic Bloc (The U.S.A., Australia, Canada and some others) have not yet ratified these conventions." (p. 125.)

3. THE GENOCIDE CONVENTION

Another article in the same issue, "Convention on the Prevention and Punishment of the Crime of Genocide," by S. Volodin (pp. 125-128) celebrates the ratification of the said convention by the Presidium of the Supreme Soviet on March 18, 1954. This ratification was probably facilitated by a gap in the definition of genocide provided by the convention. The latter does not mention mass deportations and mass internments in forced labor camps as a means of obliterating the identity of a national group. However those are the favorite methods used by the Soviet authorities which have dispersed throughout their vast territory some small national groups, to mention the Crimean Tartars and quite a few Caucasian ethnic groups (this is not a secret, because such mass deportations had been duly and publicly acknowledged by the U.S.S.R. in 1948 before the Genocide Convention was ever drafted). It is also known that a large fraction of the Baltic intelligentsia were deported to deprive their respective nations of cultural leadership.

The ratification of the convention does not mean at all that the Soviet Union would be prepared to accept an international criminal jurisdiction for the trial of genocide criminals. The Soviet author says:

... the prevention and punishment of genocide should remain within the realm of national legislation and should not be left to some sort of a vague "international criminal law" and "international criminal justice" about which American diplomats have recently prattled much in the United Nations. (p. 126.)

One may disagree with the Soviet writer and entertain on this score some doubts concerning the efficacy of the convention. Would the courts of a state, whose very government would probably be the organizer of the genocide, dare to take any action unless the responsible government were overturned either by a revolution or by a foreign war? This prospect seems to offer little consolation to the prospective victims of a new genocide.

The U.S.S.R. has accepted the Genocide Convention as usual with the reservation declining the jurisdiction of the International Court of Justice in the disputes which might arise out of its interpretation or application. Like his colleague, S. Volodin notes rather with satisfaction that the United States will not ratify the Genocide Convention (pp. 127-128).

4. TERRITORIAL WATERS

Professor V. N. Durdenevsky publishes in issue No. 7 (pp. 141-142) the review of a new book entitled: *Problem of Territorial Waters in International Law*, by A. N. Nikolayev (Moscow, 1954).¹ The reviewer then

¹ The United States deposited its instrument of ratification on Aug. 2, 1955.

² Reviewed below, p. 592.

that the problem is of great present importance if only because "there have been during the last four years 336 cases of violations by American warships of the territorial waters of China alone, without mentioning those committed to the prejudice of other countries, for instance the Latin American." (p. 141.) A. N. Nikolayev defines territorial waters as follows: "A maritime belt of a definite width along the coast of the state, this belt being a part of the state's territory and being subject to its sovereignty." Soviet territorial waters are socialist (state) property. Professor Durdenevsky thinks that:

Territorial waters have basically a dual significance for the coastal state: economic, as a source of maritime resources and as the route of navigation, and military, as a defensive maritime belt against hostile actions coming from the sea. (p. 141.)

A. N. Nikolayev presents as follows the problem of the width of territorial waters:

The width of the territorial waters varies from country to country because of different local conditions. International law does not define the maximum of the width; the questions of the width and the regime of territorial waters belong to the jurisdiction of the coastal state itself which determines them in accordance with its own national interests and the requirements of maritime navigation. (Quoted on pp. 141-142.)

Both the author and the reviewer agree that foreign warships may enter territorial waters only by permission of the coastal state, except "for generally recognized seaways" (they have especially in mind the straits of importance to Soviet navigation, and the reviewer expressly mentions the Danish Straits). They both also agree that the Caspian Sea "is a Soviet and Iranian Sea," meaning that it is divided into two zones placed under the sovereignty of the one or the other coastal state. "Flights [of foreign planes] over the Soviet or the Iranian zones may take place only with the assent of the country concerned." (p. 142.)

The author of the book upholds the thesis of the absolute sovereignty of the coastal state, but the reviewer disagrees with him, claiming that Soviet doctrine and practice have never supported this extensive interpretation:

A state may accept some limitations of its rights over the territorial waters because of reciprocity or for any other serious reasons. The U.S.S.R. has done it, agreeing for instance with other states not to proceed with the health inspection of ships which merely pass through their territorial waters and do not stop in their ports or by their shores. (p. 142.)

5. ACQUISITION OF TERRITORY

An article in the following issue, No. 8, treats another problem of state territory—"Some Problems of Territory in International Law," by S. V. Molodtsov (pp. 63-72). This article is said to reflect the concepts which will be developed in the corresponding chapter of the new textbook. After a very superficial and obviously unfavorable report on Western theories relating to territory, the author turns his attention to the Soviet

views and reminds his readers of the Decree of the Second All Russian Congress of the Soviets which rejected on November 8, 1917, in the most solemn words any annexations or subjugations of alien nationalities. He claims that the Soviet Union has always remained faithful to the Decree because she has always respected the principle of self-determination (p. 67). Then he proceeds to prove his claim by giving several examples of Soviet refusal to annex foreign populations:

For instance, in consequence of the free national decision which was expressed in the unanimous acts of the supreme legislatures of Estonia, Latvia and Lithuania, these three states in 1940 joined the U.S.S.R. as sovereign and equal Soviet Socialist Republics. . . . In 1939 in accordance with the will of the population concerned which had been expressed in a free popular vote, Western Ukraine and Western Byelorussia, previously detached illegally by the Polish landlords, joined respectively the Ukrainian and the Byelorussian Soviet Socialist Republics. Taking into consideration the freely expressed will of the population of the Sub-Carpathian Ukraine, the Soviet Union and Czechoslovakia concluded in 1945 a treaty by virtue of which this territory was included in the Ukrainian Soviet Socialist Republic. (p. 68.)

Thus the "free" decisions of the populations neatly cover all the Soviet annexations in Europe, except for the Rumanian and Finnish territories which the author forgot to mention. The cession of the Sub-Carpathian Ukraine may additionally be "explained" by another interesting view:

International law and practice of states allow for the sale or cession of territory if it takes place in the interest of the consolidation of peaceful and friendly relations between states. (p. 69.)

This view may apply to the "friendly" relations in 1945 between a weak Czechoslovakia and a powerful U.S.S.R.

Forgetting about the Soviet base in Finland, which only now is to be evacuated, the author observes:

The establishment of military bases on foreign territories is a gross violation of international law, a practice of the United States which seriously threatens the peace of the world.

For the territories annexed by the U.S.S.R. without any pretext of popular votes he finds other explanations:

International recognition, expressed in the most important international agreements, was granted to such settlement of the territorial problems as the restitution of territories to which a state had historical rights and which were unjustly detached from it. . . . Thus the Crimean Agreement of 1945 restored to the U.S.S.R. Southern Sakhalin (with the adjacent islands) and the Kurile Islands which had been discovered and occupied by Russia which had administered them until 1875 [*sic!*]. . . . The settlement of territorial problems after the Second World War aimed at the liquidation of all opportunities which the aggressive Powers could otherwise have to renew their aggressions. This was the reason, for instance, for the decision to liquidate East Prussia, this century-old outpost for aggressions against neighboring countries, and to grant to the U.S.S.R. the city of Kaliningrad (Koenigsberg) and the adjoining district. . . . (pp. 69-70.)

All these annexations are qualified by the author as so many proofs of Soviet fidelity to the principle of national self-determination.

6. DEFINITION OF AGGRESSION

K. A. Baginyan comments in his article, "The Question of the Definition of Aggression" (issue No. 1, 1955, pp. 59-67), on the Soviet proposal submitted in August, 1953, to the United Nations, and repeats the well-known arguments in its favor. But some of his remarks are worth while quoting:

According to the Soviet definition of aggression only states, i.e., subjects of international law, may become aggressors or victims of aggression. The concept of aggression does not apply to domestic conflicts and civil wars which are fought between various groups and parties within the frontiers of one and the same state. Internal conflicts and civil wars belong to the domestic affairs of states. . . . (p. 61.)

This reservation leaves room for all sorts of interpretations in the case of nations divided into two distinct political units, like Korea, Germany and Vietnam.

This author, like his colleagues, is free of any guilt complex and, despite the record of Communist activities, innocently writes:

According to the Soviet definition of aggression a state will be responsible for an indirect aggression if it commits one of the following acts: 1. promotion of subversive activities against another state (terroristic acts, diversion, etc.); 2. promoting the outbreak of a civil war on the territory of another state; 3. providing help to an internal revolution which takes place in another state or encouraging another state to resume an aggressive policy. These acts represent violations of the most important principle of international law, the principle of non-interference in the domestic affairs of other states. (p. 63.)

The author explains the meaning of economic aggression as follows:

Economic aggression is one of the forms of direct aggression. . . . It consists in the exploitation by one state of existing economic difficulties, or those artificially created by it, of other States which are economically and militarily weaker, in order to impose unequal and enslaving commercial treaties and agreements or sterile loans and credits which infringe upon the sovereignty and the economic independence of the recipient states and represent a threat to their economic life. Economic aggression also consists in those acts which hinder other states in the exploitation of their own natural resources or the nationalization of these resources, and in economic blockade. (p. 65.)

7. ATTITUDE TOWARDS THE UNITED STATES

The United States continued to be *la bête noire* of the Soviet press, including their leading law review. After two years of the new post-Stalinist foreign policy of reducing international tension, one could not yet detect any trace of relaxation in the anti-American campaign intended for domestic consumption. One may stop to consider one of the articles, entitled "The American Interpretation of International Law—An Expression of International Lawlessness" (issue No. 6, October, 1954, pp. 45-49),

because it is "dedicated" to American international lawyers and is written by an Austrian, Professor Heinrich Brandweiner. He comments on the report of a committee of the American Society of International Law concerning the applicability of laws of war to enforcement actions of the United Nations.² He mainly quotes (p. 45) the following conclusion from the report:

. . . the United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes (*e.g.*, prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes. We think it beyond doubt that the United Nations, representing practically all the nations of the earth, has the right to make such decisions.

The commentator hastens to attribute to the authors of the report the most sinister intentions:

This monstrous proposition of the leading American international lawyers should not remain unanswered, because the acceptance of the conclusions of the report would result in the situation where the United Nations would be entitled, while applying armed force, to use any weapons and methods of warfare and to refuse to abide by any rules of international law. . . . The report was prepared at a time when the armed forces of the United States, acting under the flag of the United Nations, were committing monstrous war crimes in Korea.* We are not mistaken in believing that these crimes were the very reason for the publication of this type of a report. (*ibid.*)

Professor Brandweiner considers that the Hague Convention of 1907 on Land Warfare forms a part of customary international law and is also binding on the United Nations. He adduces one argument worth considering, namely, that " . . . an aggressor, who would know in advance that these rules would not be applied to him, would act in consequence. This would result in an unheard-of savagery of warfare." (p. 47.) He adds that the Charter of the United Nations and the Statute of the International Court of Justice are founded on respect for generally recognized international law unless some of its rules were expressly modified by the Charter (*ibid.*). He denies that the use of force by the United Nations is of a different nature than its application in other cases. The United Nations should be bound by the customary rules of warfare, exactly as a victim of aggression acting in self-defense by virtue of Article 51 of the Charter would be obliged to observe the same rules in fighting the aggressor. He adds a typical Soviet argument, namely, that an alleged coercive action of the United Nations may be illegally undertaken as was the case in Korea. In such an event:

. . . these states, which pretend to be covered by their claim of applying measures of coercion on behalf of the United Nations, are themselves aggressors, while the state, against whom these military acts

² Report of Committee on Study of Legal Problems of the United Nations, Proceedings of the Society, 1952, pp. 216-220.

* See Report of Commission of International Association of Democratic Lawyers on "U. S. Crimes in Korea," dated Peking, March 31, 1952. Dr. Brandweiner was President of the Commission.

are directed, is a victim of attack. In this case the latter state has the right to individual and collective self-defense according to Article 51 of the Charter. (pp. 47-48.)

The author accuses the Society's committee of treating the United Nations as some sort of a world government and its enforcement actions as comparable to those which are undertaken in a civil war:

This point of view is completely at variance with the basic concept of international security and the principle of national sovereignty which is the foundation of the Charter and without which international law could not exist. This position covers up the denial of any international obligations of the United States towards other states of the world. . . . The report reveals the political motives of those who have ordered its drafting, because it gives a clear answer to the question: "Cui bono?". . . . American international law doctrine tries to exclude in advance the applicability of the Nürnberg principles to those who are guilty of war crimes committed in Korea and North China. At the same time the report of the committee provides the United States with the legal excuse for applying atomic weapons and other means of mass destruction everywhere where it would suit it. (pp. 48-49.)

The author adds that this latter prospect was made possible by the Uniting for Peace Resolution which "illegally" transferred the powers of the Security Council to the General Assembly.

One must add that American international law doctrine increasingly attempts to deny that international law forbids foreign intervention in civil wars. . . . Philip Jessup for instance takes this position in his book on contemporary international law. . . . After all this it is not difficult to understand that the United States expects thus to acquire the opportunity to have recourse anywhere to military intervention by any weapons and methods, if it would suit its political purposes, and would claim not to be bound by any rules of the law of war. This is why the report of the American lawyers acquires a practical rather than a theoretical meaning. (p. 49.)

Professor Brandweiner, the Soviet review or anyone else may disagree with the report; actually some of his legal arguments are worth examining. But neither he nor the Soviet editors have helped in reducing international tension and distrust by attempting to cast suspicion on the honesty of their Western colleagues.

EDITORIAL COMMENT

THE STATE TREATY WITH AUSTRIA

By the signature of the State Treaty with Austria in the Belvedere Palace at Vienna on May 15, 1955, the pledge given by the "Big Three" in the Moscow Declaration of November 1, 1943, has finally been redeemed. It was a long and hard road which led to this treaty. Nearly three hundred fruitless negotiation sessions had been held since 1946, although a draft treaty had been ready since 1949. The Berlin Conference, held at the beginning of 1954, led to a new deadlock, due to the insistence by the Soviet Union on continued occupation. The situation looked rather gloomy.¹ At the Berlin Conference Mr. Molotov had asked for a new article, providing effective measures against "anschluss" and prohibiting Austria from entering any coalition or military alliance with any state which had fought Hitlerite Germany.

It was the Austrian Government, bent as always on making use of any chance, which took the initiative. Chancellor Julius Raab visited Washington from November 22 to 26, 1954, where he was received in a friendly manner,² and also had talks with Great Britain and France. After a corresponding declaration by Mr. Molotov in Moscow and preliminary negotiations with the Austrian Ambassador in Moscow, the Soviet Union invited the Austrian Chancellor on March 24, 1955, to come to Moscow. There Soviet-Austrian negotiations took place, and on April 15, 1955, a Soviet-Austrian understanding³ was signed in the Kremlin. A Soviet note of April 19, 1955,⁴ proposed to the West a Foreign Ministers' meeting in Vienna for the purpose of signing the treaty. The West wanted first a conference of ambassadors and the Soviet Union agreed. This conference took place in Vienna from May 1 to 13, 1955, and was followed on May 15 by the signature of the treaty by the five Foreign Ministers. The treaty went into force on July 27, 1955, upon completion of ratification by the five signatories.

The treaty⁵ consists of a preamble and nine parts in thirty-eight articles.⁶ There can be no doubt that the terms of this treaty are much more favorable to Austria than those of the draft treaty, for it embodies the Soviet concessions contained in the Soviet-Austrian understanding of April

¹ See this writer's editorial, "Infelix Austria," 48 A.J.I.L. 453-458 (1954).

² See text of U. S.-Austrian Statement in New York Times, Nov. 27, 1954, p. 3. The United States recognized the "courage, resourcefulness and fortitude of the Austrian Government and its people."

³ Text in Sen. Exec. G, 84th Cong., 1st Sess., p. 40; Supplement to this JOURNAL, p. 191 below.

⁴ Text in 32 Dept. of State Bulletin 734 (1955); New York Times, April 20, 1955, p. 4.

⁵ Official English text in Sen. Exec. G, 84th Cong., 1st Sess., reprinted in Supplement to this JOURNAL, below, p. 162; see also New York Times, May 16, 1955, pp. 6-8.

⁶ The draft treaty had fifty-nine articles.

15, 1955. At the Ambassador's Conference in Vienna the Soviet Union wanted, first, the terms of the draft treaty to stand, the Soviet concessions to be contained in a bilateral Soviet-Austrian Protocol. But she accepted the American compromise proposal to leave the old text of Article 35 of the draft treaty⁷ and to include the Soviet concessions in Annex II. At the same time, Article 36 of the treaty declares the Annexes to be integral parts of the treaty. Two further concessions were made during the Ambassador's Conference in Vienna: dropping of Article 16 of the draft treaty⁸ and of other articles and eliminating from Article 17 the limitation by which the size of the Austrian Army was fixed at 53,000 men. Finally, the Foreign Ministers themselves, at Austria's request, eliminated the partial war-guilt⁹ clause from the preamble.

The treaty is a bilateral treaty between Austria and the four Occupying Powers. The latter are referred to as the "Allied and Associated Powers." But whereas this formula, used in the peace treaties concluded after the first World War, meant by "Associated Powers" the United States, it now means probably the Soviet Union. The treaty contains an accession clause.¹⁰ It is in four equally authentic texts: Russian, English, French and German, in that order.

From an Austrian point of view, the very heart of the treaty is Article 20 on evacuation. With the coming into force of the treaty, the Four-Power Agreement on Control of June 28, 1946, terminated and the Inter-Allied Command ceased to exercise any functions with regard to the administration of the City of Vienna. Upon completion of withdrawal of the occupation troops from Austria the agreement on zones of occupation shall terminate. These forces shall be withdrawn from Austria within ninety days of the coming into force of the treaty and, "in so far as possible, not later than December 31, 1955."

Thus, after seven years of annexation by Hitlerite Germany and ten years of occupation by Hitler's conquerors, Austria is re-established as a sovereign, independent and democratic state. This re-establishment is recognized by the Allied and Associated Powers, which declare that "they will respect the independence and territorial integrity of Austria."¹¹ The frontiers of Austria are the same as those existing on January 1, 1938.¹² By Article 11 Austria undertakes to recognize the Peace Treaties with Italy, Rumania, Bulgaria, Hungary, Finland and Japan, and a peace treaty which might be concluded with Germany.

Austria's sovereignty is limited by her obligations concerning the protection of human rights, by the guarantee of a democratic government, and her obligations concerning the protection of the rights of the Slovene and Croat minorities in Carinthia, Burgenland and Styria.¹³ It is highly in-

⁷ Now Art. 22 of the treaty.

⁸ Art. 16 dealt with the "voluntary repatriation of displaced persons within Austrian territory," an article which might have endangered many refugees in Austria from behind the Iron Curtain. Text of this article in New York Times, May 4, 1955, p. 12.

⁹ Original text in New York Times, May 15, 1955, p. 13.

¹⁰ Art. 37.

¹¹ Arts. 1 and 2.

¹² Art. 5.

¹³ Arts. 6, 7, 8.

interesting to see that, in spite of the disappearance of the minorities treaties concluded after the first World War and in spite of the silence on the problem in the earlier peace treaties, the international protection of minorities again has its place here, as in the Understanding on Trieste.

Under Article 9 of the treaty, Austria is bound to destroy all Nazi organizations. There are, further, two special clauses concerning Austrian legislation: Austria is bound to continue and maintain Austrian laws enacted since May 1, 1945, aimed at the liquidation of the remnants of the Nazi regime, and to maintain the Austrian law of April 3, 1919, concerning the House of Hapsburg-Lorraine.¹⁴ Article 4 contains the prohibition of "anschluss" with "Germany," which probably means the present Federal Republic of Germany as well as a possible reunited Germany. This prohibition is much more detailed than the corresponding Article 88 of the Versailles Treaty and Article 80 of the St. Germain Treaty.

The treaty imposes no limitations on the size of the future Austrian Army. But there are two types of restrictions: first, with respect to the prohibition of certain weapons, and duties as to the disposal of war matériel of Allied and German origin.¹⁵ It is interesting to note that Austria shall not acquire or possess any war matériel of German manufacture, origin or design, nor manufacture war matériel of German design; and shall not acquire or manufacture civil aircraft of German or Japanese design.¹⁶ Second, certain persons¹⁷ are not permitted to serve in the Austrian armed forces. Austrian prisoners of war shall be repatriated as soon as possible.¹⁸ Allied war graves in Austria will be respected, preserved and maintained by Austria, as well as "the memorials to the military glory of the armies which fought on Austrian territory against Hitlerite Germany."¹⁹ Each of the military clauses remains in force until modified in whole or in part by agreement between the Allied and Associated Powers and Austria, or, after Austria's membership in the United Nations, by agreement between the Security Council and Austria.

The latter clause leads us to remark that the Allied and Associated Powers promise in the preamble "to support Austria's application for admission to the United Nations organization." Austria will, no doubt, apply very soon for admission and, under the treaty, there is little doubt that she will be admitted. Will Austria's admission break the deadlock as to the admission of other states which have been waiting in vain for years to be admitted?

It will also be interesting to see whether Austria as a permanently neutral state will be granted a special legal position as a Member of the United Nations. For there is a further important limitation of Austria's sovereignty: her permanent neutrality. In Moscow the Austrian Delegation gave assurances that

¹⁴ Art. 10. The Austrian Chancellor, it was reported, regretted this article for "superfluous limitation of Austrian sovereignty."

¹⁵ Arts. 13 and 14.

^{15a} Art. 14.

¹⁶ Art. 16.

¹⁷ Art. 12; it is, in general, an anti-Nazi article.

¹⁸ Art. 18.

¹⁹ Art. 19.

²⁰ Art. 17.

the Austrian Republic intends not to join any military alliances or permit military bases on her territory, and will pursue a policy of independence in regard to all States.

The treaty contains nothing on Austria's permanent neutrality. In Vienna Mr. Molotov proposed that the four Powers "shall respect and observe a statement of Austria's permanent neutrality of the kind observed by Switzerland." The West had no objection in principle, but preferred to await the form and text of this Austrian declaration. Austria will soon enact a constitutional law declaring Austria's "perpetual neutrality" and will inform all states of this declaration and request its recognition. Austrian permanent neutrality will, therefore, be created by municipal law, although in consequence of the Soviet-Austrian understanding. But Austria will then ask for international recognition and guarantee of her permanent neutrality and of the inviolability of her territory.

As to the economic clauses of the treaty, Austria's status as a liberated country is shown by the fact that no reparations are asked,²¹ and Austrian property in Germany is to be returned;²² equally, all Austrian property in Allied territory is to be returned. Only Yugoslavia shall have the right to seize, retain, or liquidate Austrian property, rights and interests within her territory.²³ But Austria is now negotiating with Yugoslavia for a return of Austrian assets. Whereas Article 22 (Article 35 of the draft treaty) is as it was, Annex II contains the Soviet concessions; the details are not mentioned there, but only in the Soviet-Austrian understanding. Austria will not only regain the other "German assets in Austria," but also her oilfields and the Danube Shipping Company. This means much to Austria not only economically, but also has the important political consequence that there will be no "Soviet enclaves" in independent Austria. With respect to these returned assets Austria is only limited by Article 22, paragraph 13: she is not allowed to pass to foreign ownership rights and properties connected with the concessions regarding extraction and exploitation of oil; and, further, "none of the properties transferred as former German assets shall be returned to ownership of German juridical persons or where the value exceeds 260,000 shillings (ten thousand dollars) to the ownership of German natural persons."

Austria, on the other hand, waives all claims against Germany (except the return of Austrian property), and renounces all claims against the Allies; property of any of the United Nations in Austria must be restored.²⁴ The property of minority groups in Austria, who have suffered from racial or other persecution since March 13, 1938, is to be restored.²⁵ Pending the conclusion of commercial treaties, Austria, during a period of eighteen months from the coming into force of the treaty, must not discriminate against any of the United Nations and must grant them national and most-favored-nations treatment, but only on the condition of reciprocity. Austria shall grant to no country exclusive or preferential rights with regard

²¹ Art. 21.

²³ Art. 27.

²⁵ Art. 26.

²² Art. 23.

²⁴ Arts. 23, 24, 25.

to the operation of commercial aircraft in international traffic.²⁶ Navigation on the Danube shall be free for national vessels and goods of all states.²⁷

The clauses concerning the interpretation of the treaty and the settlement of disputes contain no reference to the International Court of Justice. There is, first, the organ of the four "Heads of Mission" of the former Occupying Powers. Under Article 34, these Heads of Mission, acting in concert, will, for a period not to exceed eighteen months from the coming into force of the treaty, "represent the Allied and Associated Powers in dealing with the Government of Austria in all matters concerning the execution and interpretation of the Treaty" and will "give guidance, technical advice and clarification." The Heads of Mission also have other functions, not limited to eighteen months, under other articles. According to Article 35, any dispute as to execution or interpretation of the treaty, where not otherwise provided for, and which is not settled by direct diplomatic negotiations, shall be referred to the Heads of Mission. If the latter do not resolve the dispute within two months, the dispute shall, unless another procedure is mutually agreed upon, be referred, at the request of either party, to a Commission of Three, whose decision is binding. The Commission consists of one representative of each party and a third member of a third country, selected by mutual agreement. In case of non-agreement within a month, either party may request the Secretary General of the United Nations to make the appointment. In case property, rights or interests of minority groups are heirless or unclaimed, the Austrian Government, under Article 26, shall transfer these properties to agencies or organizations to be designated by the Heads of Mission by agreement with the Austrian Government. Any dispute concerning United Nations property in Austria (Article 25) shall, under Article 30, be referred to a Conciliation Commission of two members. If within three months no agreement has been reached, either government may ask for the addition of a third member selected by mutual agreement. If no such agreement can be reached within two months, the appointment will be made, at the request of either party, by the Heads of Mission. If the latter cannot agree within one month, the Secretary General of the United Nations may be requested by either party to make the appointment.

Whereas all agreements on West Germany, including the latest Paris Agreements, are (because of the remaining problems of a German peace treaty, Germany's frontiers and her reunification) provisional only, the State Treaty with Austria gives the impression of a treaty destined to form the basis of the international position of Austria for a long time to come. On the other hand, as the Austrian Treaty, although signed in 1955, dates back to the draft of 1949, in some ways it gives a curious impression in its clauses concerning Germany, signed at a time when West Germany had already become a sovereign state, an ally in NATO, and on the way to rearmament. Apart from the anti-anschluss clauses and from Article 22,

²⁶ Art. 29.

²⁷ And not only for all of the United Nations (Art. 31).

paragraph 13, already mentioned, we can point to Article 15 which obliges Austria to co-operate in the prevention of German rearmament outside of German territory.

Although the State Treaty is much more favorable to Austria than the draft treaty, it still imposes heavy burdens on Austria. She must deliver each year for ten years one million tons of oil to the Soviet Union.²⁸ She has to pay in the next six years one hundred and fifty million dollars in goods²⁹ for the German assets in Austria held by the Soviet Union and to be returned to Austria under the treaty. This is no small burden. Austria has to pay two million dollars for the return of the Danube Shipping Company. But the Austrian Chancellor declared that Austria will be able to carry these burdens without having to lower her standard of living. The returned German assets in Austria—about 340 enterprises, one hundred agrarian, two hundred and forty industrial—will create many problems. Perhaps one hundred enterprises, originally “aryanized” by Hitlerite Germany, have to be restored under the treaty. There are difficult problems concerning returned agrarian enterprises.³⁰ Many of the returned industrial enterprises are facing bankruptcy; all of them require much new capital for modernization. The evacuation of occupation troops, so highly welcomed, means, on the other hand, a yearly loss of sixty million dollars in foreign currency. The creation of an Austrian Army strong enough to protect her permanent neutrality, involves, of course, high costs. Negotiations are going on, as mentioned, with Yugoslavia. There will be negotiations with the holders of American oil concessions in Austria. Negotiations are pending with the Committee of Jewish Claims against Austria for the compensation of victims of Nazism. There is the problem, arising out of Article 22, paragraph 13, against which West Germany has protested both to the West and to Austria. But Chancellor Raab declared that the question of honestly acquired property of German citizens might lend itself to negotiations.

There will be, further, the many and often delicate problems of Austria's new permanent neutrality. There is the problem of the five-year commercial treaty to be concluded with the Soviet Union. There is need to remain in the best relations with the United States, which, up to now, has alone furnished Austria with capital. Notwithstanding the anti-German features of the treaty, Austria needs good relations with West Germany; these relations as to trade, capital, and tourist traffic are extremely important to Austria.

²⁸ Austria's oil production was three million tons in 1954.

²⁹ This latter concession was already made by the Soviet Union at the Berlin Conference in 1954.

³⁰ *E.g.*, those originally belonging to Jewish owners, but where for fifteen years small farmers have been compulsorily settled; or those still belonging to German nationals. A special case is that of the latifundia of Prince Esterházy in the Burgenland which certainly do not constitute “German assets,” but were long ago confiscated by the Soviet Union. Later, Prince Esterházy, a Hungarian citizen, together with Cardinal Mindszenty, was condemned by Communist Hungary and all his property declared confiscated.

The treaty creates a sovereign, independent, democratic Austria which is treated as a liberated country. It is very interesting to inquire what the standpoint of the treaty is with regard to the problem of Austria's continuity and identity in law with pre-1938 Austria. We may say that the identity is upheld, without closing one's eyes to realities. First, the German annexation is recognized as a fact. The preamble states that Hitlerite Germany annexed Austria by force on March 13, 1938, and incorporated its territory into the German Reich. The Moscow Declaration is merely quoted as "regarding" the annexation null and void and as "affirming their wish to see Austria re-established as a free and independent State." The preamble expressly speaks of the annexation of Austria and of her "participation in the war as an *integral* part of Germany." Although in one case the phrase "during the German occupation of Austria" is used,³¹ the treaty regularly uses the phrase "during the period of the German annexation of Austria," which is counted from March 13, 1938, to May 8, 1945. That is why the Austrian partial war-guilt clause was removed. That is why the treaty always speaks of the "war with Germany" or of "the war in Europe." That is why the treaty in Article 12, paragraph 2, discriminates against Austrian nationals "who were German nationals *before* March 13, 1938." It is also highly interesting to note that, in contrast to the clause concerning Ethiopia in the Peace Treaty of 1947 with Italy, the Allied and Associated Powers promise in Article 3 that they will incorporate into the German peace treaty a clause concerning "the renunciation by Germany of all territorial and political claims in respect of Austria and Austrian territory." This annexation is also the reason why, under Article 28, "interest payments on Austrian Government securities, falling due after March 12, 1938 and before May 8, 1945 constitute a claim on Germany and not on Austria."

Second, an independent and sovereign Austria is, under Articles 1 and 2, only re-established by this treaty. But Austria, even if not sovereign, has existed again since May, 1945. Third, this Austria since 1945, and the sovereign Austria re-established by the treaty, are identical in law with the Republic of Austria of 1918. That this is so, is clearly shown by Article 10, paragraph 2, which obliges Austria to maintain the Austrian law of April 3, 1919. It is clearly shown by Article 28, paragraphs 2 and 4, as to Austrian laws before March 13, 1938, and prewar contracts concluded by the Government of Austria or persons who were nationals of Austria on March 12, 1938.

The treaty, therefore, recognizes Austria's extinction in fact between March 13, 1938, and May 8, 1945, and yet recognizes her identity and continuity. It is therefore a treaty proving Marek's³² proposed "fourth rule" as to the identity of states: complete but illegal suppression of a state in time of peace, but continuance of a mere "ideal legal notion" of the state in question; identity and continuity, provided this state is re-established in fact within a reasonable time.

³¹ Art. 25, par. 4a.

³² Krystyna Marek, *Identity and Continuity of States in International Law* (Geneva, 1954).

The treaty, of fundamental importance to Austria, also has worldwide political consequences. What will be the results of the Austrian Treaty in world politics remains to be seen. But there is no doubt that Austria will not only solve the economic problems arising from the treaty, but will manage her permanent neutrality successfully and in a manner advantageous for Austria and in the interest of world peace. Austria can in her new task be sure of the continued friendship of the United States, expressed in the message of the President of the United States to the President of Austria.³³ For, as the President said, the "conduct of the Austrian people during the ten long years they have labored under the heavy burden of foreign occupation has commanded the profound respect of all the American people."

JOSEF L. KUNZ

END OF THE COLD WAR?

The "Summit" Conference at Geneva,¹ together with arrangements for supplementary meetings, seriously calls for reconsideration of the international situation. Included therein are the pressing problem of armaments and nuclear warfare and the less dramatic but, to readers of this JOURNAL, no less interesting problem of an increased willingness to make use of international law for the disposition of international issues.

An end to the "cold war"—Are we not adopting too many of these journalistic stereotypes?—might, of course, mean the beginning of a hot or shooting war. That is not anticipated. According to all reports, Soviet Russia is not at the present time disposed to launch or to provoke full-scale military hostilities with the United States, and it is certain that the United States is far from any disposition to make war on Soviet Russia. These policy attitudes, if they may be so called, are probably both entirely sound and also reliable.

This leaves the fundamental hypothesis of Soviet Russian policy of world conquest and Communist domination unresolved. According to fundamental Marxist doctrine, this hypothesis would seem to be imperative, and many utterances from Moscow would certainly seem to support this interpretation. On the other hand, there has always run through Marxian and other Communist theory a strain of empiricism and even expediency which permits and even imposes deviation from doctrine when such a course seems desirable. At the least or the most, we simply have no certain answer now.

As for armaments limitation, including nuclear weapons, the problem has to be left to the governments concerned and to the technical experts, in spite of the intense interest in the matter of all students of international relations and the anxieties of the common man. There is some evidence that the leading governments concerned are sufficiently alarmed concerning the potential effects of nuclear and other recently developed weapons to be seriously inhibited in any activities which might, even ac-

³³ 32 Dept. of State Bulletin 873 (1955); New York Times, May 16, 1955, p. 6.

¹ See 33 Dept. of State Bulletin 171-177 (1955).

cidentally, lead to war. The reactions regarding poison gas and bacteriological warfare in the past are reproduced here on a higher level.

Increased willingness to resort to international law and judicial settlement seems somewhat less likely as a result of the contemporary relaxation. The Russian coolness toward international law and adjudication (shades of 1899 and 1907!) is not a mere matter of Soviet international politics, but is in part a basic racial or national trait.² Whether this difference of attitude can be overcome or bridged remains to be seen and, in any event, would probably take many years.

Obviously, this leaves the United States with an extremely difficult choice of attitudes and policies. Probably intransigent opposition as advocated by Senator McCarthy would not produce any catastrophe and might solve the whole problem, but the guess is a little hazardous, and certainly public opinion would not support it. Extreme appeasement, on the other hand, would certainly make matters worse and would, likewise, not meet with public favor. The only solution lies in the attitude being taken at Geneva and elsewhere by President Eisenhower and Secretary Dulles of calm, patient, conciliatory negotiation. The miracle of good relations between East and West may conceivably be brought about in this way; it is perfectly certain that such a result can be brought about peaceably in no other way.

PITMAN B. POTTER

THE TREATY OF 1955 BETWEEN THE UNITED STATES AND PANAMA

On January 25, 1955, the United States and Panama signed a new Treaty of Mutual Understanding and Co-operation, accompanied by a Memorandum of Understandings Reached concerning relations between the two countries arising from the construction, operation, maintenance and protection of the Panama Canal by the United States in accordance with existing treaties.

At first reading the treaty appears to be one of extraordinary generosity on the part of the United States. The President, in his letter of May 9, 1955, transmitting the treaty to the Senate¹ in order to receive its advice and consent to ratification, quoted from the preamble of the treaty that its purpose was "further to demonstrate the mutual understanding and cooperation of the two countries and to strengthen the bonds of understanding and friendship between their respective countries." Is the treaty more than one of *mutual* understanding and co-operation? Is there justification for the concessions it makes to the Republic of Panama, taking into account the circumstances and conditions under which it was negotiated? Is it, in other words, one-sided in the benefits it confers, as some of its critics have claimed?

In his message to the Senate the President included an elaborate explanatory statement submitted by the Secretary of State analyzing the articles of the treaty and explaining the purpose of each of them, followed

² See citation at note 119 in Nussbaum, A Concise History of the Law of Nations (1954, rev. ed.), p. 248.

¹ Senate Exec. F, 84th Cong., 1st Sess.

by an explanation of the undertakings on the part of the United States set forth in the Memorandum of Understandings. On the same day the injunction of secrecy was removed from the two documents. Hearings before the Foreign Relations Committee of the Senate took place July 15, 18 and 20, at which statements were made or submitted for the record by the Assistant Secretary of State for Inter-American Affairs, the Assistant Secretary of the Army and the Secretary of the Panama Canal Company, in support of the treaty; but also by representatives of the American Federation of Labor and other persons interested in the effect of the treaty upon the private interests of those using the Canal or employed in its operation. On July 26 the Committee on Foreign Relations submitted its report recommending that the Senate give its approval to the treaty; and on July 29 the Senate gave its approval by a vote of 72-14.

The three most significant provisions of the treaty and those in respect to which it might be expected that there would be differences of opinion are: (1) the increase in the annuity granted to Panama; (2) the concessions made by the United States in respect to the abandonment of former treaty rights of the United States in certain specific matters; and (3) the effect of the concessions upon the personal interests of the Americans residing in the Canal Zone, employees of the United States Government and others.

The increase in the annuity naturally called for first comment, since the original convention of 1903² had fixed \$250,000, which was increased in 1936³ to \$430,000, and now increased to \$1,930,000, more than four times the previous annuity. The report of the Foreign Relations Committee frankly justifies the increase upon "equitable considerations, rather than any legal obligation of the United States," believing that "account should be taken of the rise in living costs and the decreased purchasing power of the dollar in the light of world conditions," observing, however, at the same time that by Article I of the treaty the parties "recognize the absence of any obligation on the part of either party to alter the amount of the annuity," lest the new treaty provision regarding annuity should be construed as calling for periodic adjustments.

But what effect would the increased annuity have upon the tolls to be charged to vessels using the Canal? And would the economies that might be called for in order to balance costs and income result in lowering the living standards of the employees of the Panama Canal Company? The President of the Pacific American Steamship Company, representing other shipowners, asked assurance that the deficit with which the Panama Canal Company would be faced would not be passed on to the users of the Canal in the form of higher tolls. While the returns from the Canal far exceeded the annuity, it was argued, legislation would be required to use the returns to meet the increase; and there was fear on the part of the shipowners that commerce would have to bear the burden of what was being done "for diplomatic or military or political reasons."

² 3 A.J.I.L. Supp. 130 (1909).

³ 34 *ibid.* 139 (1940). The increase took into account the depreciation of the dollar.

In line with the attitude of the shipowners, representatives of the American Federation of Labor, while insisting that they were not opposed to the treaty, asked for modifications to assure them that the direct or indirect costs resulting from the treaty should not be passed on to the civilian employees in the Canal Zone:

The obligations which our Government has to its citizens who are serving it in the Canal Zone should not be subordinated to its desires to improve the Panamanian economy.

By the terms of the new treaty the United States concedes to Panama certain rights of taxation which Panama had renounced under the treaties of 1903 and 1936, and transfers to Panama certain property rights granted to the United States under the earlier treaties but believed to be no longer necessary. Panama will now be entitled to levy income taxes on Panamanian citizens who work in the Canal Zone, regardless of their place of residence, and on other non-United States citizen employees residing outside the Zone—both groups being previously immune under the treaty of 1903. United States citizen employees continue to remain exempt.

The [Foreign Relations] committee concurs with the executive branch that the present tax situation is inequitable and that its continuance would serve no real interest of the United States.

Among the other provisions intended to benefit the Panamanian economy is the restriction of the privileges of purchasing at Canal Zone commissaries and other sales stores and of importing articles duty-free into the Zone, limiting them to residents of the Zone, as well as United States citizen employees of the Zone and members of the United States armed forces. Articles produced in Panama, when purchased for use in the Zone, will be exempted from the provisions of the "Buy American Act"; while the United States on its part agrees to withdraw from sales of supplies to ships passing through the Canal. The United States was, however, unwilling to meet the Panamanian demand that the United States purchase all articles needed in the Zone, except war material, from Panamanian sources, believing that this would have involved the United States "in a subsidization of the Republic's economy." On the other hand the United States agrees not to import from abroad, for resale within the Zone, certain luxury or tourist items upon which Panamanian stores would have to pay import duties and thus be unable to compete with Canal Zone duty-free imports.

Panama had long complained of the dual-wage system prevailing in the Canal Zone resulting, it was alleged, in discrimination against Panamanians performing the same work done by citizens of the United States. The Memorandum establishes a single basic wage scale for all employees regardless of whether the employee is a United States or Panamanian citizen. It was objected, in testimony before the Foreign Relations Committee, that this would have the effect of lowering the pay of American citizens in respect to positions normally filled from the local labor market. But the

Committee found that only a small number would be affected by the provision, and that it was important to remove discriminations that had long been a source of irritation to Panama.

The provisions of the treaty and of the Memorandum with respect to transfers of property from the United States to Panama are intricate; but with two exceptions the land and improvements are within the jurisdiction of Panama and they are not believed by the Canal authorities to be required for canal purposes. The transfers of the areas in Colon call for a revision of the boundary of the Canal Zone, which is defined in Article VI of the treaty. The United States abandons the monopoly granted to it by the treaty of 1903 over railroad and highway transportation across the Isthmus in territory under the jurisdiction of Panama, but at the same time agrees to seek legislation to build a bridge across the Canal at the town of Balboa, west of Panama City, pursuant to the 1942 Agreement. On its part Panama leases free of cost certain small areas adjacent to the United States Embassy; and it agrees to reserve exclusively for the purpose of maneuvers and military training an area of land in the Rio Hato region which the United States had been permitted to use during the last war but not after the war.

Lastly, by Article IV of the treaty the United States waives its right under the 1903 treaty to prescribe and enforce in perpetuity sanitary ordinances in the cities of Colon and Panama, the provision being considered justifiable in view of the evidence that the Republic was fully competent to take over the function.

The conclusions set forth in the report of the Foreign Relations Committee were that the two instruments were "just and equitable, giving due regard to the vital interests of the United States and the Republic of Panama"; and that they safeguarded the defenses required for the security of the Canal and the welfare of United States citizens and armed forces employed in the Zone. While the Committee was "fully conscious of the substantial economic benefits" which would flow to Panama, it believed that the economic development of this strategically important nation was of direct concern to the United States. "A strong and stable Panama," said the report, "means greater security for the canal and better living conditions for our citizens on the isthmus," at the same time eliminating a number of points of friction and dissatisfaction.

No one can read the texts of the two documents, one in treaty form and the other a series of understandings clarifying and supplementing the treaty, without a feeling of respect for the position taken by the Department of State and for the response of the Foreign Relations Committee to the issues of policy presented to it. Clearly the agreement was not between two parties of equal bargaining power; clearly the United States gave more than it received in specific concessions. But at the same time equally clearly the United States was wise in taking into account that the terms of the earlier treaties no longer represented what was just and equitable under the changed conditions of the present day. The stability,

economic as well as political, of Panama became a vital concern to the United States from the time the independence of Panama was recognized and the building of the Canal undertaken; and it is equally a vital concern today. It is to the credit both of the Department of State and of the Senate that this vital concern has been recognized, and recognized without weakening in any way the essential interests of the United States in the practical administration of the Canal or in its defense and security.

C. G. FENWICK

NOTES AND COMMENTS

FREDERIC RENÉ COUDERT

February 11, 1871–April 1, 1955

Coudert Brothers has been a name of distinction at the Bar of New York for a century. Its European affiliations, particularly in Paris, have given it an outstanding reputation in the practice of international law. Frederic René Coudert, Sr., was one of the leading counsel for the United States in the *Bering Sea Arbitration* at Paris in 1893. Frederic René Coudert, Jr., was born in New York on February 11, 1871. After graduating from Columbia University, he was admitted to the Bar of New York in 1892, and accompanied his father to Paris where he was initiated into the argument and application of principles of international law while in attendance upon that important international arbitration. He became a member of the firm of Coudert Brothers in 1895.

After serving in the Spanish-American War of 1898 as a volunteer officer, young Coudert at the age of twenty-eight was senior counsel before the Supreme Court of the United States in the *Insular Cases*, in which the court was called upon to determine the legal status of the islands and their inhabitants ceded by Spain to the United States by the Peace Treaty. His briefs and arguments helped to formulate American jurisprudence on the novel constitutional and international questions at issue. He had appeared two years earlier before the Supreme Court in cases involving international law and treaty interpretation.

In 1913–1914, prior to the war in Europe, Mr. Coudert was Special Assistant to the Attorney General of the United States. After the outbreak of the war he was, in 1915, retained as legal adviser to the British Embassy to the United States, which post he retained until 1920. Prior to the declaration of war by the United States in April, 1917, the relations between the Government of the United States and the Allied Governments of Great Britain and France became dangerously entangled in disputes over prize law and neutrality. With the permission of the Secretary of State, Mr. Coudert undertook “to be a buffer between the State Department and the Allied Governments and to absorb as much of the shock as possible.” An account of his discussions in London and Paris was reported to the State Department in a long letter to Counselor Frank L. Polk, dated September 28, 1915, which was published for the first time last year in Mr. Coudert’s small volume, *A Half Century of International Problems*.¹ France, Belgium, Italy and the Czarist Russian Government were also among Mr. Coudert’s government clients.

When he took up the practice of international law there were relatively few members of the Bar who took any interest in that specialized branch

¹ Reviewed in 49 A.J.I.L. 277 (1955).

of the law. On one occasion when addressing a group of lawyers, Mr. Coudert opened his remarks by saying: "It is a rather serious charge to be told that one is an international lawyer. When another lawyer says that to me in a public place, I feel that he is aiming to get away with some of my best domestic clients."

Mr. Coudert was active in a number of legal and international associations. He served as a member of the Committee on International Law of the American Bar Association and on the Advisory Board of the *American Bar Association Journal*. He was one of the original members of the American Society of International Law and was a popular toastmaster at a number of its annual banquets in Washington. He was its President from 1942 to 1946 in succession to Secretary of State Cordell Hull. He was an official delegate to the Universal Congress of Lawyers and Jurists at St. Louis in 1904, a member of the *Institut de Droit International*, Honorary President of the France-America Society, Vice President of the Pilgrims of the United States, and a Trustee of Columbia University in New York.

The development of his views as a publicist was shown in his inaugural presidential address before the American Society of International Law in 1942, when Mr. Coudert defended his advocacy of collective security to avoid war, in lieu of neutrality, against the criticism that he was entering the domain of international politics rather than that of international law. "The two," he answered, "are completely inseparable; to devise beautiful codes in a vacuum is a pleasant intellectual recreation, but it is not worth the time of the active, practical men who compose this Society and the American Bar Association. International law and international relations cannot be segregated in water-tight compartments. If the lawyers are to take the lead to which the traditions of their profession and their past influence entitle them, they must take a positive stand upon the problem of how to sanction international law."

Mr. Coudert's pungent and witty presentation of difficult problems was inimitable. He was constantly in demand as a public speaker and was the author of numerous articles on international law and international relations. In 1913 he published a volume entitled *Certainty and Justice*, and, a few months before he died, the collection of occasional papers previously mentioned. He lived during a period of great transition in the relationships of members of the family of nations. He participated as counsel in many cases arising in the courts and foreign offices requiring the application or adaptation of traditional principles to new situations. A comprehensive treatment of his life and work would be welcomed as a valuable addition to the history of the evolutionary years in which he lived.

GEORGE A. FINCH
Honorary Editor-in-Chief

THE GENEVA CONVENTIONS OF 1949 BEFORE THE UNITED STATES SENATE

Six years have passed since the establishment by the Diplomatic Conference of Geneva of the text of the Geneva Conventions of August 12, 1949, for the Protection of War Victims.¹ During this period, forty-eight states, including the U.S.S.R. and a number of its allies and nine of the members of the North Atlantic Treaty Organization, have ratified or acceded to the new treaties.²

The conventions were submitted to the United States Senate for its consideration and advice and consent to ratification on April 26, 1951. Hearings were not held at that time because the Korean hostilities were then in progress,³ and it was not until March of this year that the Secretary of State requested consideration of the conventions by the Senate. A hearing, which lasted only a half-day, was held by the Foreign Relations Committee on June 3,⁴ and the Committee reported out the conventions with a recommendation of favorable action on June 27.⁵ On July 6, after a brief discussion on the floor, the Senate gave its advice and consent to the ratifica-

¹ Sen. Exec. Docs. Nos. D, E, F, and G, 82d Cong., 1st Sess. (1951); Dept. of State Pub. 3938, General Foreign Policy Series 34 (1950).

The literature on the conventions is already extensive. Among the general studies of the subject may be mentioned Gutteridge, "The Geneva Conventions of 1949," 26 British Year Book of International Law 294 (1949), and "The Protection of Civilians in Occupied Territory," Year Book of World Affairs, 1951, p. 290; Hudson, "Progress of the Geneva Conventions of 1949," 45 A.J.I.L. 776 (1951); Lauterpacht, "The Problem of the Revision of the Law of War," 29 British Year Book of International Law 360 (1952); Pictet, "The New Geneva Conventions for the Protection of War Victims," 45 A.J.I.L. 462 (1951); de la Pradelle, *La Conférence diplomatique et les nouvelles conventions de Genève du 12 août 1949* (1951); Yingling and Ginnane, "The Geneva Conventions of 1949," 46 A.J.I.L. 393 (1952). The *Revue internationale de la Croix-Rouge*, published by the International Committee of the Red Cross, contains a number of excellent specialized studies of the conventions. The International Red Cross is also preparing commentaries on each of the conventions, of which one, *Commentary on the Geneva Conventions of 12 August 1949, Vol. I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Pictet ed., 1952), has been published in English and French; the commentary on the *Civilians Convention* is expected to be the next to appear. For extensive bibliographical references on the new conventions, see de Preux, "Diffusion des conventions de Genève de 1949," 37 *Revue internationale de la Croix-Rouge* 259 ff., 317 ff., and 375 ff. (1955).

² Report of the Committee on Foreign Relations on Execs. D, E, F, and G, 82d Cong., 1st Sess. (Geneva Conventions for the Protection of War Victims), S. Exec. Rep. No. 9, 84th Cong., 1st Sess. (1955) (hereinafter referred to as "Report"), p. 3.

³ The Geneva Conventions of 1949 were not in force with regard to the parties in the Korean conflict, but both sides stated that they would apply their principles. See telegram from Secretary of State Acheson to the International Committee of the Red Cross, July 5, 1950, reproduced in *Le Comité international de la Croix-Rouge et le conflit de Corée* (1952), Vol. I, p. 13; Letter from the Representative of the United States of America to the Secretary General of the United Nations, July 5, 1951, 25 Dept. of State Bulletin 189 (1951), U.N. Doc. S/2232, July 6, 1951; Department of State Press Release 582, July 24, 1952, 27 Dept. of State Bulletin 171 (1952); Report, p. 64. See also 33 Dept. of State Bulletin 69-79 (1955).

⁴ Hearing before Senate Committee on Foreign Relations, 84th Cong., 1st Sess., on Execs. D, E, F, and G, 82d Cong., 1st Sess. (The Geneva Conventions for the Protection of War Victims), June 3, 1955 (hereinafter referred to as "Hearing").

⁵ Report, and 101 Cong. Rec. 7862 (daily ed., June 27, 1955).

tion of the four Geneva Conventions by a unanimous vote of 77-0.⁶ Thus, upon the deposit of its instrument of ratification on August 2, 1955, the United States joined the ranks of those who have pledged themselves to this important body of humanitarian law.

The Senate made its advice and consent to the ratification of the conventions subject to two reservations and a "statement" regarding the reservations made to the conventions by other states.⁷ The first of the two reservations was that made by the United States to Article 68 of the Civilians Convention at the time of signature. The second paragraph of that article permits the imposition of the death penalty on inhabitants of occupied territory for serious offenses against the Occupying Power only if "such offences were punishable by death under the law of the occupied territory in force before the occupation began." Because of fears that the territorial sovereign would, as one of its last acts before being ousted from an area by the enemy, abolish the death penalty in the area about to be occupied,⁸ the United States and several other states⁹ reserved the right to impose this penalty without regard to the pre-existing law of the occupied area. The second reservation relates to the commercial use of the Red Cross emblem. Under the domestic law of the United States currently in force, pre-1905 users of the Red Cross insigne and of the words "Red Cross" and "Geneva Cross" are exempted from the statutory prohibition on the employment of this sign and these terms by persons other than "the American National Red Cross and its duly authorized employees and agents and the sanitary and hospital authorities of the armed forces of the United States."¹⁰ Article 53 of the Geneva Wounded and Sick Convention of 1949 prohibits the use of these words and device by "individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention . . . irrespective of the date of its adoption" and "without effect on any rights acquired through prior use," and Article 54 requires the enactment of the necessary implementing legislation. Determined opposition to the new restrictions which would be required by the Wounded and Sick Convention was offered by a group of pre-1905 users of the Red Cross sign and name for commercial purposes.¹¹ Such was their

⁶ *Ibid.* 8537-8551 (daily ed., July 6, 1955). ⁷ *Ibid.* 8550-8551.

⁸ See Final Record of the Diplomatic Conference of Geneva of 1949 (Federal Political Department, Berne, 1949), Vol. IIA, pp. 673-674, 765-768, 788-790; Vol. IIB, pp. 424-431; Vol. III, pp. 140-141.

⁹ The United Kingdom, Canada, The Netherlands, and New Zealand.

¹⁰ 18 U.S.C. § 706. Regarding the failure of the Congress to enact legislation giving effect to Art. 28 of the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 47 Stat. 2074, at 2092, see *Federal Trade Commission v. A.P.W. Paper Co., Inc.*, 328 U.S. 193 (1946).

¹¹ Hearing, pp. 12-15, 29-30, 33, 37-56. The use of the Red Cross emblem, which adopted the reversed Federal colors of Switzerland, was brought about by the Geneva Red Cross Convention of August 22, 1864, 18 de Martens, *Nouveau Recueil général de traités* 607 at 611 (1873). Prior to that time, ambulances and hospitals had been marked in various ways; see "L'Origine du signe de la Croix Rouge," 36 *Revue internationale de la Croix-Rouge* 456 (1954). The first prohibition on the future commercial use of the Red Cross emblem was not enacted by the United States until 1905. Act of Jan. 5, 1905, 33 Stat. 599, incorporating the American National Red Cross.

enthusiasm that this matter became the major point at issue in the hearings before the Senate Foreign Relations Committee. The Committee considered it desirable to adopt a reservation on this point in order to avoid depriving the commercial users of a valuable property right, and the Senate accordingly made its advice and consent to the Wounded and Sick Convention subject to the following reservation:

. . . irrespective of any provision or provisions in said convention to the contrary, nothing contained therein shall make unlawful, or obligate the United States of America to make unlawful, any use or right of use within the United States of America and its Territories and possessions of the Red Cross emblem, sign, insignia, or words as was lawful by reason of domestic law and of use begun prior to January 5, 1905, provided such use by pre-1905 users does not extend to the placing of the Red Cross emblem, sign, or insignia upon aircraft, vessels, vehicles, buildings or other structures, or upon the ground.¹²

It will be observed that the reservation will permit the Congress to take the necessary measures to prohibit the "outdoor" use of the Red Cross emblem on buildings, vehicles, or on the ground, where there would be the greatest likelihood that confusion might be occasioned by commercial use of the sign in time of war. Because Article 53 is not self-executing, legislation dealing with this point, broadening the permissible categories of persons and activities which may use the emblem, and prohibiting the improper use of the distinctive markings provided for prisoner-of-war camps and internment camps will be necessary.¹³

Three reservations made by the Union of Soviet Socialist Republics and its allies¹⁴ at the time of signature and maintained upon ratification were given careful consideration by the Executive Branch of the Government and by the Senate.¹⁵ Of the three, two appear to be of comparatively minor importance. The first reservation, made to Article 10 of the Wounded and Sick Convention and the corresponding common article in the other treaties,¹⁶ would require the consent of the reserving state to the services of a substitute for the Protecting Power when the soldiers of the reserving state held as prisoners of war by the enemy lack or cease to enjoy the protection of such a Power designated by the reserving state. Since the institution of the Protecting Power is primarily designed to guard the interests of the prisoners rather than of the Detaining Power, a reservation of power to veto the appointment of a Protecting Power probably affects

¹² 101 Cong. Rec. 8550 (daily ed., July 6, 1955), and Report, pp. 24-26.

¹³ Report, pp. 30-31. The implementing legislation would give domestic effect to Art. 44, Wounded and Sick Convention (use of emblem by International Committee of the Red Cross and its personnel); Arts. 18-22, Civilians Convention (use of emblem by civilian hospitals and medical facilities); Art. 23, Prisoners of War Convention; and Art. 83, Civilians Convention (marking of prisoner of war and civilian internee camps).

¹⁴ Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Rumania, Ukrainian Soviet Socialist Republic, Yugoslavia.

¹⁵ Letter of March 29, 1955, from Secretary of State to Chairman of the Foreign Relations Committee, and Enclosure, Hearing, p. 60; Report, pp. 28-29.

¹⁶ Art. 10, Wounded, Sick, and Shipwrecked at Sea Convention; Art. 10, Prisoners of War Convention; Art. 11, Civilians Convention.

the interests of the Detaining Power only to the extent that the exercise of the reserved right may deprive the state holding prisoners of impartial scrutiny of its behavior toward them. The second reservation, which applies to Article 12 of the Prisoners of War Convention and Article 10 of the Civilians Convention would, if prisoners of war or civilian protected persons are transferred by one Power to another's custody, hold the transferor Power jointly liable with the transferee for violations of the conventions committed by the transferee. The reservation is a departure from the terms of the convention but not of great moment.

The third Russian reservation is of great import. Article 85 of the Prisoners of War Convention of 1949 provides that:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.¹⁷

The U.S.S.R. and its associates stated that they would not "extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principle of the Nuremberg Trial, for war crimes and crimes against humanity" and that such persons would be treated like other criminals. It would be reasonable to suppose that the reservation indicates that, while the protection of the convention continues until final conviction, including the exhaustion of any appellate procedures available to the accused,¹⁸ the convicted offender is thereafter placed at the mercy of the reserving state. Indeed, those states which have reserved on this point may consider themselves under no legal obligation to extend humane treatment to such individuals or even to account for them. Such a reservation made by the Communist states, which are notoriously disposed toward the corruption of the doctrine of war criminality,¹⁹ must give rise to serious concern.

It may be noted that Art. 85, when read in conjunction with Art. 102 of the convention, which stipulates that a prisoner of war can be validly sentenced "once the sentence has been pronounced by the same courts according to the same procedure in the case of members of the armed forces of the Detaining Power," renders it probable that prisoners of war detained by the United States will be subject to trial by international tribunals like those of Nuremberg and Tokyo. Unless U. S. law is amended to provide that American military personnel may be tried by international tribunals, these provisions would in all probability require trial of prisoners accused of war crimes by the same courts that try American military personnel in civil courts or courts-martial. But *cf.* Case of Kappler (Italy, Supreme Military Tribunal, 1952), 36 *Rivista di diritto internazionale* 193 (1953), digested in 49 *A.J.I.L.* 1 (1955), stating, *obiter*, that Art. 85 has no relevance to war crimes under international law.

¹⁷ Report, p. 28; see Berman, *Soviet Military Law and Administration* 129 (1955). The view hitherto taken by the jurisprudence of the United States has been that enemy military personnel tried for war crimes are not entitled to the judicial protection provided by the Geneva Prisoners of War Convention of 1929. In re Yamashita, 70 F. 1 (1946). Art. 85, even as affected by the Soviet reservation, thus represents a small advance over the existing law.

¹⁸ The Ministry of Defence, *Treatment of British Prisoners of War in Korea* (H. S. O., 1955), pp. 31-32 (reviewed in 49 *A.J.I.L.* 431 (1955)), regarding the treatment of all personnel of the U. N. Command taken as prisoners of war by the Chinese Communists and North Korean forces as "war criminals."

The response of the Senate to these reservations was, on the recommendation of the Executive Branch, to make the following statement,²⁰ appropriately modified to accord with each convention:

Rejecting the reservations which States have made with respect to the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, the United States accepts treaty relations with all parties to that convention, except as to the changes proposed by such reservations.

In pursuing this course, the United States has rejected the alternative of holding the reservations "incompatible with the purpose of the Convention" so that no treaty relationships would arise between the United States and the reserving states.²¹ In effect, the statement constitutes a proposal to agree to disagree, not as to the entire articles as to which the U.S.S.R. and other states made reservations, but only as to those substantive elements of the articles encompassed by the reservations. This position seems to accord with the views of the International Court of Justice in the *Genocide Convention Reservations* Opinion that:

. . . it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.²²

It remains to be seen whether the U.S.S.R. and other states maintaining the same reservations as the U.S.S.R. will take a like position toward the United States reservations regarding the Red Cross emblem and the death penalty for civilians.

The record of the proceedings before the Senate Foreign Relations Committee contains a few significant references to the interpretation attached by the United States to several provisions of the conventions. The Committee concurred with the view of the Executive Branch that "article 118 [of the Prisoners of War Convention] does nothing to change accepted principles of international law under which asylum is applicable to prisoners of war," and found nothing in the conventions "which will compel the United States forcibly to repatriate prisoners of war who fear political persecution, personal injury, or death should they return to their homeland."²³ The United States thus continues to adhere to the interpretation of Article 118 of the Prisoners of War Convention which received the support of the United States and of the majority of the Members of the United Nations during the Korean conflict.²⁴ The Committee also ex-

²⁰ 101 Cong. Rec. 8550-8551 (daily ed., July 6, 1955). The "statement" will, of course, apply to all reservations made to the conventions, except as to Art. 68 of the Civilians Convention, whether made by members of the Soviet bloc or other states.

²¹ Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. Reports 15 at 27.

²² *Ibid.*

²³ Report, pp. 23-24.

²⁴ See Secretary of State Acheson's statement in Committee I of the General Assembly, U.N. General Assembly, 7th Sess., Official Records, First Committee, U.N. Doc. A/C.1/SR.

pressed its view that the administrative boards and competent bodies required by Articles 35, 43, and 78 of the Civilians Convention for the review of the detention and internment of civilians may be created "with advisory functions only, leaving the final decision to a high official or officer of the government."²⁵

It is to be hoped that the ratification of the Geneva Conventions of 1949 by two great powers of the West and East, the United States and the Union of Soviet Socialist Republics, may inspire further ratifications and accessions so that the conventions may assume their rightful place as universal humanitarian law.

R. R. BAXTER

✓ IMMUNITY FROM TAXATION OF REAL PROPERTY OWNED BY DELEGATIONS
TO THE UNITED NATIONS

On April 27, 1955 the Governor of the State of New York signed a bill adding the following as Section 20-a to the New York State Tax Law:

Real property of a foreign government which is a member of the United Nations or of any worldwide international organization as defined in subdivision twenty above, the legal title to which stands in the name of such foreign government or of the principal resident representative or resident representative with the rank of ambassador or minister plenipotentiary of such foreign government to the United Nations or other such worldwide international organization, used exclusively for the purposes of maintaining offices or quarters, for such representatives, or offices for the staff of such representatives, within a radius of twelve miles of the principal headquarters of the United Nations, shall be exempt from taxation, but if a portion only of any lot or building of any such government or representative is used exclusively for the purposes herein described, then such lot or building shall be exempt only to the extent of the value of the portion so used, and the remaining or other portion, to the extent of the value of such remaining or other portion, shall be subject to taxation unless otherwise exempt from taxation by law. The exemption from taxation granted by this subdivision shall apply to taxes which become due and payable after the date such property shall be used for the purposes herein stated, and shall continue with respect to such property as long as the property shall remain the property of such government and be used for the purposes herein stated and no longer. The exemption from taxation granted by this subdivision shall not apply to assessments heretofore or hereafter levied on a city-wide or borough-wide basis and which are collectible with the real property tax, nor to assessments heretofore or hereafter levied to pay the cost of special, local or district improvements when such assessments are levied upon the basis of benefits derived by such property from the improvements. If at any time there are in arrears assessments heretofore or hereafter levied against the property, or taxes heretofore or hereafter become due with respect to any portion of the property used for purposes other than those herein described and not otherwise exempt from tax-

512, pp. 26-27, published as *The Problem of Peace in Korea*, Dept. of State Pub. 4771 (1952), and General Assembly Resolution 610 (VII) of Dec. 3, 1952, U.N. General Assembly, 7th Sess., Official Records, Supp. No. 20, U.N. Doc. A/2361, p. 3.

²⁵ Report, pp. 22-23.

ation by law, then the exemption from taxation granted by this subdivision shall not apply unless and until such arrearages are fully paid up.

Substantially similar legislation had been introduced in previous years but the bills died in committee.

Prior to the enactment of this statute a city in Westchester County granted exemption for a building occupied as the residence of the principal resident representative of a foreign government to the United Nations. Such grant of exemption was based on the Headquarters Agreement,¹ Section 15 of which provides that every person designated by a Member of the United Nations as its principal resident representative to the United Nations shall

be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords diplomatic envoys accredited to it.

On the other hand, since foreign states began to acquire real property in the City of New York for the purposes of their delegations to the United Nations, the City refused to grant exemption, while the foreign governments generally refused to pay the tax assessed. This dispute has now been resolved by the Act, apparently even as to prior assessments, inasmuch as the statute provides that the exemption shall apply "to taxes which become due and payable after the date such property shall be used for the purposes herein stated," which means that, to this extent, the statute is retroactive and foreign governments will not be required to pay tax claims accumulated during past years.

On the other hand, the exemption does not apply to assessments for services such as water and sewer assessments. This is in accordance with the practice in Washington, D. C.²

The New York statute also provides that where only a portion of the premises is used for tax-exempt purposes, tax is due to the extent of the value of the portion not used for such purposes.

The Act provides for exemption of both offices and quarters. The bills introduced in the New York State Legislature between 1951 and 1954 attempted to distinguish buildings used for offices from those used as residences of the principal resident representatives, exempting the former but not the residences. This distinction was unsound and the writer had occasion to bring this to the attention of Senator MacNeil Mitchell, sponsor of the bill in the New York State Legislature, who concurred in his view.³

¹ Agreement of June 26, 1947, between the United Nations and the United States of America regarding the Headquarters of the United Nations, T.I.A.S. No. 1676; 43 A.J.I.L. Supp. 8 (1949).

² 4 Hackworth, Digest of International Law 579; letter by Secretary of State Bayard, 4 Moore, Digest 670.

³ Ever since embassy and legation buildings have been exempt from taxation in Washington, D. C., the exemption has applied to the residence of the ambassador or minister. See, *e.g.*, the letter of Secretary of State Seward to Mr. Wallach of July 5, 1867, 4 Moore, Digest of International Law 669. See also Reference re Power of Municipalities to Levy Rates on Foreign Legations, [1943] 2 D.L.R. 481, where the

In the version of the bill finally enacted, the distinction was fortunately abandoned, so that "offices or quarters" are equally exempt.

The Act contains two additional provisions which limit the exemption, and which, it is submitted, are invalid. The first of these is contained in a last-minute amendment of the Act which limits the exemption to real estate situated "within a radius of 12 miles of the principal headquarters of the United Nations." The second is the provision that the exemption shall not apply unless the tax for that portion of the property, if any, which is not tax-exempt, as well as assessments for services, have been paid.

These two limitations are invalid if the Headquarters Agreement itself constitutes a grant of exemption from real estate taxes on delegation property. It is believed that this is the correct interpretation and that the statute is merely declaratory of the grant, except for the limiting provisions.

The following are two of the arguments which might be urged against such an interpretation:

1. That the Agreement was intended to grant only such privileges and immunities as are available as a matter of right under international law, whereas real estate tax exemption is granted only as a matter of comity or courtesy.

2. That the Agreement grants only such privileges and immunities as the United States accords to diplomatic envoys; that the United States does not accord exemption from taxation of legation real property to the envoys themselves, but rather to the foreign governments; and that the Agreement, therefore, does not extend such exemption to representatives to the United Nations.

These arguments would, it is believed, be unsound for the following reasons:

1. Under Section 15 of the Headquarters Agreement, the principal resident representatives to the United Nations are entitled to the privileges and immunities which the United States "accords" to diplomatic envoys accredited to it. The question, therefore, is not whether a given privilege or immunity is granted by the United States in fulfillment of a duty imposed by international law, but only whether it is "accorded" at all, irrespective of its basis in law, comity or courtesy.⁴ That embassy and legation buildings belonging to foreign governments and used by their diplomatic envoys accredited to the United States are, in fact, exempt from real property tax is, of course, undisputed.^{4a}

2. The distinction made in the second argument between immunities

Supreme Court of Canada said: "One of the diplomatic immunities recognized by English Law, as already intimated, is the inviolability of the Ambassador's residence, that is to say, of the legation."

⁴ For a discussion of this question, which is of great theoretical interest, see Bishop, "Immunity from Taxation of Foreign State-Owned Property," 46 A.J.I.L. 239 (1952); Lyons, "Immunities Other Than Jurisdictional of the Property of Diplomatic Envoys," 30 Brit. Yr. Bk. Int. Law 116, 138, *et seq.* (1953).

^{4a} See District of Columbia Code, Title 47, secs. 801-a (c), 803.

granted to foreign envoys themselves and immunities granted to foreign governments is equally unsound. The usual terminology is to refer to the exemption of legation buildings from taxation as one of the immunities granted to diplomatic agents. Thus the *Foreign Service Manual* of the United States of February 12, 1952, treats the exemption of "property in the District of Columbia owned by foreign governments and used for Embassy or Legation purposes" under the general heading: "Tax Exemptions Granted by United States to Foreign Representatives." Also, in a circular letter of July 25, 1955, addressed to the Chiefs of Mission in Washington, D. C., the Department of State treats exemption of mission buildings from real estate tax under the general heading of "Rights and Privileges Accorded Representatives of Foreign Governments in the United States." Similarly, Article 18 of the Havana Convention on Diplomatic Officers of February 20, 1928,⁵ provides:

Diplomatic officers shall be exempt in the State to which they are accredited: . . . (2) From all land taxes on the building of the mission, when it belongs to the respective government;

Section 24 of the American Institute Project of 1925 for the Codification of American International Law,⁶ states:

Diplomatic agents should be exempt in the country where they are accredited. . . . (2) From all land taxes on the legation building.

The commentary to Article 22 of the Harvard Research Draft on Diplomatic Privileges and Immunities,⁷ states:

Fiscal immunities are commonly held to be granted out of international courtesy, forming part of the "non-essential" prerogatives of diplomats.

Secretary of State Gresham⁸ stated that, "the British Embassy here" being tax exempt, "the ambassador of the United States in England" should "be likewise relieved," thus using the terms "embassy" and "ambassador" indiscriminately. Oppenheim⁹ refers to tax exemptions as a "privilege of envoys." Lawrence¹⁰ states: "The ambassador is free from the payment of taxes levied upon it [the hotel]. . . ." Ogdon¹¹ states that in practice states are inclined "to exempt diplomatic officers . . . from taxes upon the house or mission." In *Republic of France v. City of New York*,¹² the court stated:

The rule is familiar that diplomatic agents are absolutely immune from allegiance to the State to which they are accredited. . . . The privilege of immunity carries with it an exemption from taxation of the per-

⁵ Sixth International Conference of American States, Final Act (Havana, 1928), pp. 142, 150; Appendix 7 to Harvard Research in International Law, Diplomatic Privileges and Immunities, 26 A.J.I.L. Supp. 175, 176 (1932).

⁶ *Idem* 168, 170.

⁷ *Idem* 115.

⁸ Letter to Mr. Bayard, Ambassador to England, of May 29, 1893, 4 Moore, Digest of International Law 671, 672.

⁹ 1 International Law 717 (7th ed., 1948).

¹⁰ Principles of International Law 294 (7th ed., 1927).

¹¹ Juridical Bases of Diplomatic Immunity 137 (1936).

¹² New York Law Journal, Dec. 30, 1925, p. 1279 (Sup. Ct. N. Y. Co.).

sonalty of an ambassador and the property belonging to him, or the property of his sovereign, and applies to the premises occupied by him as his residence or for the purpose of transacting his governmental business.

In *Reference re Power of Municipalities to Levy Rates on Foreign Legations*,¹³ the court used the following significant language:

The general result appears to be that in England taxes and rates imposed by statute in general terms in respect of the occupation or the ownership of real property are not recoverable from diplomatic agents in respect of real property occupied by them or owned by them, or their States, and occupied and used for diplomatic purposes.

The *Landgericht Berlin* declared, in a decision of October 3, 1953,¹⁴ that the extritoriality of the legation building and of the ambassador's residence is "derived from the Envoy's person and inviolability."

In the light of this common usage of including tax exemption of diplomatic property within the diplomatic privileges and immunities granted to envoys, the Headquarters Agreement must be interpreted as granting such exemption to representatives to the United Nations.

Assuming that there were any recognized distinction between "personal" and other privileges and immunities of diplomatic envoys, and that the exemption of legation buildings were not a "personal" privilege or immunity, the Headquarters Agreement would still apply to both, since its grant is not limited to "personal" privileges and immunities, but refers to privileges and immunities in general.

The argument for interpreting the Headquarters Agreement as granting immunity from taxation of mission buildings owned by foreign governments is strengthened by the legislative history of the Agreement in the United States, which shows that a broad and comprehensive grant was intended. The Foreign Affairs Committee of the House of Representatives¹⁵ makes it clear that it was the intention of Congress to grant to the permanent representatives to the United Nations full diplomatic status, and further states:

While it might be possible to strike out reference to diplomatic status and perhaps renegotiate on a basis that would simply enumerate the privileges granted, to do so would be to concentrate on words rather than substance. The premise of the Agreement is that the sum total of the privileges necessary approximates that of diplomatic status, and the committee accept this view.

Being part of an international compact, Section 15 of the Headquarters Agreement is the law of the land and overrides State law.¹⁶ If it is true

¹³ [1943] 2 D.L.R. 481, at 499.

¹⁴ 4 *Rechtsprechung zum Wiedergutmachungsrecht* 368 (1953); translation, 48 A.J.I.L. 161 (1954).

¹⁵ H. Rep. No. 1093, 80th Cong., 1st Sess. 11, 12.

¹⁶ *U.S. v. Pink*, 315 U.S. 203, 230, 231 (1942); *U.S. v. Belmont*, 301 U.S. 324 (1937); Opinion of the Acting Atty. General of the U.S. of Aug. 20, 1946, 40 Op. Atty. Gen. 469; Opinion of the Atty. General of the State of New York, 1946, Op. Atty. Gen. N.Y. 75, 76; Corwin, *Constitution of the United States of America* 437 ff. (1953).

that buildings owned by foreign governments and used by them for purposes of their delegations to the United Nations are exempt from taxation by force of the Headquarters Agreement, then the New York statute is merely declaratory of already existing higher law, and, to the extent that the statute contains limitations not contained in the compact, such limitations are invalid. This applies to the 12-mile radius provision, as well as to the provision that tax exemption shall be dependent upon the payment of certain arrears of taxes and assessments.

It may appear at first sight that the latter provision is not important, inasmuch as it may be assumed that a government would pay all taxes from which it is not exempt. The situation, however, is complicated by the fact that there is an area of dispute still open, namely, as to property used for consular or other public purposes. It is common practice in New York City for the consulates to share a building with the United Nations delegations. Many governments have refused to pay tax assessments upon their consular premises on the ground, *e.g.*, that their governments grant reciprocal exemption to United States consulates. The City of New York, however, has refused to honor requests for exemption even where the State Department has endorsed them as a matter of comity. The City limits exemptions only to those specifically granted by treaty.

The consequence of the statutory provision in question is that foreign governments are required to relinquish their claim to exemption for consular premises, as a condition of enjoying an exemption concededly due them, except for this condition.¹⁷ It places the foreign government in the dilemma of either yielding to a tax claim which it deems unjustified, or risking the loss of an express statutory exemption.

In spite of these shortcomings, it is nevertheless gratifying that the New York law has at least recognized the general principle of exemption of delegation property from real estate taxes.

ROBERT DELSON

ATTEMPTS TO TRANSMUTE INDEMNITY INTO DISCHARGE OF CLAIMS IN EXECUTIVE AGREEMENTS

In discussing *Seery v. United States*,¹ decided this year in the Court of Claims, neither Professor Covey Oliver in his editorial comment in this JOURNAL for July, 1955,² nor Professor Arthur Sutherland in his comment in the *Harvard Law Review* for June, 1955,³ has called attention to the actual language used in the agreement in question. The same significant lapse is attributable to the court, some of the parties' counsel, and the Department of Justice. The result has been to raise a Constitutional issue

¹⁷ Bishop, *loc. cit. supra*, note 4, makes a strong case for exemption of real property owned by foreign governments and used for consular purposes. See especially pp. 248, 253, 256.

¹ 127 F. Supp. 601 (Ct. Cl. 1955); digested in 49 A.J.I.L. 410 (1955).

² "Executive Agreements and Emanations from the Fifth Amendment," 49 A.J.I.L. 362 (1955).

³ "The Flag, The Constitution, and International Agreements," 68 Harv. L. Rev. 1374 (1955).

that could have been avoided. Those who draft such documents will be discouraged from choosing language carefully if attention is not paid to the words when the agreements come before the courts.

In the *Seery* case, the principal question was whether Mrs. Seery was barred from her suit for compensation for damage to her property in Austria by the following language found in paragraph 6 of Article I of an executive agreement between Austria and the United States dated June 21, 1947:⁴

The Austrian Government guarantees the Government of the United States to adjudicate individual claims, pay to individuals and settle with individuals, both Austrian nationals and others owning property, rendering service or residing in Austria, and to guarantee full protection to the United States against any claims for services, supplies, and other obligations of whatever nature which occurred during the period 9 April 1945 to 1 July 1947.

The Government defended itself against Mrs. Seery's claim partly on the ground that these words of the agreement removed her right to compensation from the United States for property taken from her for public use. The court held that this part of the agreement was invalid under the United States Constitution because it purported to have this effect.

The quoted language, however, says nothing about the claimant's rights against the United States Government. It defines the obligations of the Government of Austria in connection with claims against the United States. It is certainly not the language of *discharge* of obligations. Contrast it with the words in the Lombardo Agreement concluded with Italy a few weeks later,⁵ stating that "The Government of Italy discharges and agrees to save harmless the Government of the United States" from various claims of individual Italians and others. The same language of discharge was used in the 1948 Yugoslav Claims Settlement Agreement,⁶ which was only applicable to claims against Yugoslavia, however, not against the United States. The Lombardo Agreement, of course, was supported by the discharge of claims in Article 76 of the Treaty of Peace with Italy,⁷ which had been ratified with the due consent of the Senate.

The language of the agreement with Austria follows a pattern used in many executive agreements providing for the settlement of claims arising out of World War II. It made its first public appearance in paragraph 6 (a) of the agreement of May 16, 1946, with India,⁸ settling Lend-Lease and other war accounts: "The Government of India hereby assumes responsibility for the settlement and payment of claims against the Government of the United States. . . ." This agreement was signed for the

⁴ 61 Stat. (4) 4168, T.I.A.S. No. 1920; 67 U. N. Treaty Series 89, No. I: 868.

⁵ Memorandum of Understanding of August 14, 1947, 61 Stat. (4) 3962, T.I.A.S. No. 1757, Par. 6 (a); 42 A.J.I.L. Supp. 146 (1948).

⁶ 62 Stat. (3) 2658, T.I.A.S. No. 1803.

⁷ 61 Stat. (2) 1245, T.I.A.S. No. 1648. See also Convention between the United States and Norway respecting the claims of Hannevig against the United States and Jones against Norway, 62 Stat. (2) 1798 (1948), T.I.A.S. No. 1865; *Hannevig v. U. S.*, 81 F. Supp. 743 (Ct. Cl. 1949).

⁸ 60 Stat. (2) 1753, T.I.A.S. No. 1532.

United States by Acting Secretary of State Dean Acheson, who had a habit of asking for citation of the authority for the undertakings in agreements taken to him for signature. His assistants would not in any event have been able to pass lightly over the assumption of claims provisions; *a fortiori*, if they had been intended to be real discharges, it may be assumed that Mr. Acheson's own deep understanding of the Constitutional bases of our foreign relations would have led him to ask the same questions as those in judicial and academic circles who have expressed doubts as to the President's power to do this by executive agreement.

Almost identical assumption of claims language is found in the settlement agreements with France,⁹ Belgium,¹⁰ The Netherlands,¹¹ and others.¹² The relevant portion of the French agreement was before the Court of Claims in 1952 in the *Etlimar* case.¹³ In the *Seery* decision, that court repudiated language in the *Etlimar* opinion to the effect that an international agreement, concluded without participation by Congress, could deprive a claimant of the right to sue the United States for taking property without compensation. Since the failure of the Supreme Court to accept the Fourth Circuit's reasoning in the *Capps* case,¹⁴ this may prove to be the first time any executive agreement has been finally held unconstitutional, a result that was wholly unnecessary.

What seems most unfortunate in these cases is the effort of the Government to stretch these agreements beyond the limits of the intent of the negotiators, reflected in the way they were written. They were intended to be assumptions of responsibility and indemnities by other governments, not discharges of individual claims. It was hoped, of course, that the other governments would be able to settle directly with the claimants, but no words of discharge were inserted. They were written that way precisely because of doubts held by many people of the Constitutional power of the Executive Branch alone to deprive any person of his claim against the United States without just compensation.¹⁵ Professor Sutherland's comment¹⁶ effectively presents reasons why these doubts may have been justified. Highly respected opinion, on the other hand, has contended that the President does have this power.¹⁷ It was not necessary, however, to test the power to its fullest extent in these agreements, and no effort was made to do so. An undertaking from the other governments to settle the claims

⁹ 61 Stat. (4) 4175, T.I.A.S. No. 1928 (1946).

¹⁰ 62 Stat. (3) 3984, T.I.A.S. No. 2064 (1946).

¹¹ 61 Stat. (4) 3924; T.I.A.S. No. 1750 (1947).

¹² The texts are collected in various Reports to Congress on Lend-Lease Operations, from No. 23 through No. 28.

¹³ *Etlimar Societe Anonyme v. U. S.*, 106 F. Supp. 191 (Ct. Cl. 1952).

¹⁴ *U. S. v. Guy W. Capps, Inc.*, 348 U. S. 296 (1955), affirming 204 F. 2d 655 (4th Cir. 1953); digested in 48 A.J.I.L. 153 (1954) and 49 A.J.I.L. 407 (1955).

¹⁵ See, e.g., Borchard, "Extraterritorial Confiscations," 36 A.J.I.L. 275 (1942); Jessup, "The Litvinoff Assignment and the Pink Case," *ibid.* 282 (1942); Borchard, "Treaties and Executive Agreements: A Reply," 54 Yale L.J. 616 (1945).

¹⁶ 68 Harv. L. Rev. 1374 (1955).

¹⁷ See, e.g., McDougal and Lans, "Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy," 54 Yale L.J. 181, 534 (1945).

was enough; if someone collected from the United States first, a clear obligation would bind the other government to indemnify the United States. If these agreements had been limited to this theory, the Constitutional test in court would have been avoided. In the *Ettimar* case, the plaintiff had already received payment from the French Government for all the loss it could prove, and it had no right to recover from the United States as well. The decision for the Government could have rested on that ground alone. In the *Seery* case, the Government does not have to assert that the claim was discharged by the agreement. It need only show that it has been held liable, despite the assertion of all other legitimate defenses, for damage done by U. S. forces. Automatically there arises the obligation of Austria to settle with Mrs. Seery, or to reimburse the United States if the suit has gone to final judgment and the damages have been paid. There would have been no question of the Constitutional power of the President to enter into the agreement.

MICHAEL H. CARDOZO

THE ORGANIZATION OF CENTRAL AMERICAN STATES: ELECTION
OF THE SECRETARY GENERAL

Not until more than three years after the ratification of the Charter of San Salvador did the five Central American States find it possible to take the first legal step to put into effect the provisions of the Charter.¹ Ratification of the instrument was accomplished on December 14, 1951; but political difficulties arose to delay the meeting of Foreign Ministers which was to elect a Secretary General and put the machinery of the Charter in motion. For a time it appeared as if the Organization of Central American States was to be no more than another dream fading away before the harsh realities of political rivalry.

Finally, however, the first Meeting of Foreign Ministers, which was to have been summoned a year after the convention came into force, was arranged for August 17, 1955, to be held in Antigua, Guatemala, a historic city which had been for more than two hundred years the capital of the Captaincy General of Guatemala and, as a plaque on the wall of the ancient palace of the Captain General reads, "the metropolis of Central America." The building itself, founded in 1675 and now a museum, bears an inscription recording that "*De aquí irradió la cultura a todo el Reyno de Goathemala*"—"From this center culture irradiated to the whole of the kingdom of Guatemala."

Doubtless the meeting was facilitated by the fact that, little more than a year before, the Government of Guatemala under President Arbenz had been overthrown and a new government set up in which the neighboring states had greater confidence. In his opening address the President of Guatemala, Colonel Castillo Armas, made it clear that the ultimate objective of the new organization, as the preamble of its Charter proclaimed, was political unity, "the reconstruction of the Central American nationality," which, he said, was "the primary, fundamental and urgent

¹ See 46 A.J.I.L. 509 (1952).

problem to which all others must be subordinated." But this political objective could only be attained after the organization had succeeded in developing closer economic, social and cultural ties, on the basis of which it would be possible to build political union as the normal superstructure in the evolutionary process.

But in spite of their agreement upon these general principles the delegates found themselves presented with a practical problem which, for the moment, appeared to threaten the success of the meeting. The first item on the agenda had been the election of a Secretary General and the establishment of the central Secretariat. It had been agreed that the choice should fall to a Costa Rican. But in the meantime Costa Rica and Nicaragua had been involved in a controversy that had led the Council of the Organization of American States to call a Meeting of Foreign Ministers under the Rio Treaty of 1947.² As a result Nicaragua refused to accept any Costa Rican as Secretary General, and only after long negotiation was it possible to agree upon Dr. J. Guillermo Trabanino, a Salvadoran, to hold the post. Sr. Trabanino was Minister of Foreign Affairs of El Salvador at the time of his election; and being a man of outstanding character and ability, his selection argues well for the development of the Secretariat into an effective agency of co-operation.

The budget of the Central American Office was fixed at \$125,000 annually, and quotas were assigned to the different member governments for its support. Among other resolutions looking to the promotion of the objectives of the organization, one of particular interest is the resolution calling upon the Central American Office to give preferential consideration to the study of a possible Central American Customs Union. The flag of the new organization is to be blue in color, with a white center in which will appear the traditional shield of Central America surrounded with the words, "Organization of Central American States."³

C. G. FENWICK

² See 49 *ibid.* 235 (1955).

³ See O.D.E.C.A., Primera Reunión de Ministros de Relaciones Exteriores (Publicaciones del Ministerio de Relaciones Exteriores, Antigua, Guatemala).

JUDICIAL DECISIONS

BY OLIVER J. LISSITZYN

Of the Board of Editors

United Nations—powers and procedure of General Assembly—voting—mandates—South-West Africa—League of Nations

VOTING PROCEDURE ON QUESTIONS RELATING TO REPORTS AND PETITIONS CONCERNING THE TERRITORY OF SOUTH-WEST AFRICA. I.C.J. Reports, 1955, p. 67.

International Court of Justice.¹ Advisory Opinion of June 7, 1955.

By a resolution of November 23, 1954, the General Assembly of the United Nations requested the Court to give an advisory opinion on the following questions:

- (a) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:
“Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations”?
- (b) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa?

The Court noted that the rule quoted in the request is Rule F, set out in Resolution 844 (IX) adopted by the General Assembly on October 11, 1954. It noted, further, that a Committee on South-West Africa established by the General Assembly prepared two sets of rules—one relating to its own procedure, which was “designed to be analogous to that which was followed by the Permanent Mandates Commission under the League of Nations,” and the other relating to the procedure to be followed by the General Assembly in its consideration of the reports and observations of the Committee on South-West Africa. Rule F was part of a regime established by resolutions of the General Assembly in which the expressed intention was to conform to the Advisory Opinion of 1950. “The scope of Question (a),” the Court went on to say, “is thus limited by the wording used and by the reference to the General Assembly’s acceptance of

¹ Composed for this case of President Hackworth, Vice President Badawi, and Judges Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Hsu Mo, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Lauterpacht, Moreno Quintana and Córdova. The English text of the opinion is authoritative.

the Opinion previously given by the Court. It is therefore essential that the Court should keep within the bounds of the question put to it by the General Assembly."

Noting that there was a slight difference between the English and the French texts of the question submitted to the Court, and that the French version, in asking whether Rule F corresponded to a correct interpretation of the previous Opinion, seemed to express more precisely the intention of the General Assembly, the Court went on to say:

It refers generally to the previous Opinion, but the debates in the Fourth Committee and in the General Assembly indicate that the latter was primarily concerned with the question whether the rule as to the system of voting corresponds to a correct interpretation of the following passage:

"The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."

At this stage consideration will be given to the first part of this passage, namely, the statement that "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System. . . ." The task of the Court is to establish the true meaning of this statement. The question is whether this statement may properly be construed as including the system of voting to be followed by the General Assembly.

The function of supervision exercised by the General Assembly generally takes the form of action based on the reports and observations of the Committee on South-West Africa, whose functions are analogous to those exercised by the Permanent Mandates Commission. The words "the degree of supervision" relate to the extent of the substantive supervision thus exercised, and not to the manner in which the collective will of the General Assembly is expressed.

Accordingly, these words, if given their ordinary and natural meaning, should not be interpreted as relating to procedural matters. They relate to the measure and means of supervision. They comprise the means employed by the supervising authority in obtaining adequate information regarding the administration of the Territory and the methods adopted for evaluating such information, maintaining working relations with the Mandatory, and otherwise exercising normal and customary supervisory functions. The statement that the degree of supervision to be exercised by the General Assembly should not exceed that which was applied under the Mandates System means that the General Assembly should not adopt such methods of supervision or impose such conditions on the Mandatory as are inconsistent with the terms of the Mandate or with a proper degree of supervision measured by the standard and the methods applied by the Council of the League of Nations.

Consequently, the action of the General Assembly in adopting Rule F, which prescribes the two-thirds majority rule, cannot be regarded as relevant to the "degree of supervision." It follows that this Rule cannot be considered as instituting a greater degree of supervision than that which was envisaged by the previous Opinion of the Court.

* * *

This interpretation of the words used is confirmed by an examination of the circumstances which led to their use.

The Court, in the previous Opinion, was answering the question: "Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?" It was dealing with two kinds of international obligations assumed by the Union of South Africa under the Mandate.

The first kind of obligation was directly related to the administration of the Territory and corresponded to the sacred trust of civilization referred to in Article 22 of the Covenant. The Court found that these obligations did not lapse on the dissolution of the League of Nations.

The second kind of obligations related to the supervision of the administration of the mandated Territory by the League. The Court, taking into account the Resolution of the Assembly of the League of Nations of April 18th, 1946, and the provisions of Articles 10 and 80 of the Charter, recognized that the General Assembly was legally qualified to exercise the supervisory functions which had previously been exercised by the Council of the League. It was necessary for the purpose of defining the international obligations of the Union to indicate the limits within which it was subject to the exercise of supervision by the General Assembly.

In order to indicate those limits, it was necessary to deal with the problem presented by methods of supervision and the scope of their application. The General Assembly was competent, under the Charter, to devise methods of supervision and to regulate, within prescribed limitations, the scope of their application. These were matters in which the obligations could be subjected to precise and objective determination, and it was necessary to indicate this in a clear and unequivocal manner. This was done when it was said in the previous Opinion that: "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System. . . ."

On the other hand, in marking out those limits, the Court did not need to deal with the system of voting. In recognizing that the competence of the General Assembly to exercise its supervisory functions was based on the Charter, the Court also recognized implicitly that decisions relating to the exercise of such functions must be taken in accordance with the relevant provisions of the Charter, that is, the provisions of Article 18. If the Court had intended that the limits to the degree of supervision should be understood to include the maintenance of the system of voting followed by the Council of the League of Nations, it would have been contradicting itself and running counter to the provisions of the Charter. It follows that the statement that "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System" cannot be interpreted as extending to the voting system of the General Assembly.

Accordingly, the Court finds that the statement in the Opinion of July 11th, 1950, that "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System," must be interpreted as relating to substantive matters, and as not including or relating to the system of voting followed by the Council of the League of Nations. . . .

* * *

The Court will now consider whether Rule F is in accord with the statement in the Opinion of 1950, that the supervision to be exercised by the General Assembly "should conform as far as possible to the

procedure followed in this respect by the Council of the League of Nations."

While, as indicated above, the statement regarding the degree of supervision to be exercised by the General Assembly over the Mandate of South-West Africa, relates to substantive matters, the statement requiring conformity "as far as possible" with the procedure followed in the matter of supervision by the Council of the League of Nations, relates to the way in which supervision is to be exercised, a matter which is procedural in character. Thus, both substance and procedure are dealt with in the passage in question and both relate to the exercise of supervision. The word "procedure" there used must be understood as referring to those procedural steps whereby supervision is to be effected.

The voting system of the General Assembly was not in contemplation when the Court, in its Opinion of 1950, stated that "supervision should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. The voting system is related to the composition and functions of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure, but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature. For these reasons, the voting system of the General Assembly must be considered as not being included in the procedure which, according to the previous Opinion of the Court, the General Assembly should follow in exercising its supervisory functions.

* * *

There is, however, another aspect of this question. Rule F is contained in a group of six special rules, which were adopted by the General Assembly in Resolution 844 (IX) of October 11th, 1954. They were designed to apply "as far as possible, and pending the conclusion of an agreement between the United Nations and the Union of South Africa, the procedure followed in that respect by the Council of the League of Nations." It seems to be clear that, both in adopting Rule F and in referring Question (a) to the Court, the General Assembly was proceeding upon the assumption that the word "procedure," as used in the second part of the passage in question, includes the voting system. It is also necessary to examine the question on the basis of that assumption. Looking at the matter from that point of view, there is equally no incompatibility between Rule F and the previous Opinion.

It is to be recalled that the Court, in its previous Opinion, stated that "The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations

on these questions or matters to the Members of the United Nations." Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter. While, in exercising that supervision, the General Assembly should not deviate from the Mandate, its authority to take decisions in order to effect such supervision is derived from its own constitution.

Such being the case, it follows that the General Assembly, in adopting a method of reaching decisions in respect of the annual reports and petitions concerning South-West Africa should base itself exclusively on the Charter. Article 18 of the Charter authorizes the General Assembly to decide whether decisions of this nature involve "important questions" or "other questions." The General Assembly has concluded that decisions by it on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as decisions on important questions to which the two-thirds majority rule should apply. It is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find the rules governing the making of its decisions in connection with those functions. It would be legally impossible for the General Assembly, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa, and, on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter.

When the Court stated in its previous Opinion that in exercising its supervisory functions the General Assembly should conform "as far as possible to the procedure followed in this respect by the Council of the League of Nations," it was indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council. Consequently, the expression "as far as possible" was designed to allow for adjustments and modifications necessitated by legal or practical considerations.

In the matter of determining how to take decisions relating to reports and petitions concerning the Territory of South-West Africa, there was but one course open to the General Assembly. It had before it a text, Article 18 of the Charter, which prescribes the methods for taking decisions. The Opinion of 1950 left the General Assembly with Article 18 of the Charter as the sole legal basis for the voting system applicable to decisions in connection with its supervisory functions. It was on that basis that Rule F was adopted. In adopting that Rule, the General Assembly acted within the bounds of legal possibility. . . .

* * *

The Court therefore considers that Rule F, recited in Question (a) . . . is in accord with the passage contained in the Court's previous Opinion, namely, that "The degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." Accordingly, the Court concludes that Rule F corresponds to a correct interpretation of its Advisory Opinion of 1950.

Question (a) having been answered in the affirmative, it is not necessary to consider Question (b)

The Court's answer to the question submitted to it was unanimous. Judges Basdevant, Klaestad and Lauterpacht appended separate concurring opinions.

NATO Status of Forces Agreement—rights of American soldiers abroad—reservations to treaties—powers of Secretary of State

UNITED STATES EX REL. KEEFE *v.* DULLES. 222 Fed. 2d 390.

U. S. Ct. of Appeals, Dist. of Col., Sept. 16, 1954, rehearing den., Oct. 15, 1954, cert. den. Feb. 28, 1955. W. K. Miller, Ct. J.

In 1953 a private in the United States Army stationed in France pleaded guilty in a French court to a charge that in off-duty hours he, with another American soldier, had beaten a French cab driver and stolen his cab. He was sentenced to five years in prison. Thereupon his wife filed in his behalf in the United States District Court for the District of Columbia a petition for *habeas corpus*, naming the Secretary of State, the Secretary of Defense and the Secretary of the Army, and charging them with conspiring to deprive and actually depriving her husband of liberty. The petition was dismissed by the District Court on the ground that petitioner was not in respondents' custody and that the court had no jurisdiction.

On appeal this decision was affirmed. The petition was examined not only as one for *habeas corpus*, but also as one for a mandatory order requiring the Secretary of State to obtain Keefe's release through diplomatic negotiations. The court pointed out that, under the Senate reservation to the ratification of the Status of Forces Agreement¹ relied upon by petitioner, an American observer was required to attend the trial and report to the commanding officer any violation of Article VII, sec. 9, of the agreement, and the commanding officer was required to "request the Department of State to take appropriate action to protect the rights of the accused." In this case, the allegation that Keefe's Constitutional rights were violated was not supported by the record. An American Army representative attended the trial and reported no unconstitutional irregularities, and the Secretary of State was not requested by the commanding officer to make representations to France. The court went on to say:

Even had the request been made, whether to grant it would have been within the Secretary's discretion. He was not under a legal duty to attempt through diplomatic processes to obtain Keefe's release. Quite to the contrary, the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or direction in such matters.

NOTE: For a statement on behalf of the French Government concerning immunities of American armed forces in France see 43 Rev. Critique de Droit Int. Privé 892 (1954).

¹ U. S. Treaties and Other International Acts Series, No. 2846; 48 A.J.I.L. Supp. 83, 100 (1954).

Workmen's compensation—national treatment clause—treaty of commerce with Italy—effect of treaties in American courts—treaty-making power—interpretation of treaties

IANNONE v. RADORY CONSTRUCTION CORPORATION. 141 N. Y. S. 2d 311. N. Y. Sup. Ct., App. Div., 3d Dept., May 11, 1955, as amended May 18, 1955. Zeller, J.

A resident of the United States died of injuries in an industrial accident. Death benefits were awarded by the New York Workmen's Compensation Board to his widow, 54 years of age, and minor daughter, both of whom were residents and nationals of Italy. Section 17 of the New York Workmen's Compensation Law provides in part:

Compensation under this chapter to aliens not residents . . . of the United States or Canada, shall be the same in amount as provided for residents . . . except that the board, may at its option, or upon the application of the insurance carrier, shall, commute as of the date of death all compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such compensation as determined by the board. . . .

Under this section the Board commuted the awards to one-half of the present value of all future payments, on the ground that "such commutation does not constitute treatment of a (non-resident alien) claimant less favorable but, indeed, quite possibly more favorable than that accorded nationals of the United States."

On appeal, such commutation was held improper. Article XII (1) of the Treaty of Friendship, Commerce and Navigation with Italy¹ reads:

The nationals of either High Contracting Party, regardless of alienage or place of residence, shall be accorded rights and privileges no less favorable than those accorded to the nationals of the other High Contracting Party, under laws and regulations within the territories of such other High Contracting Party that . . . (b) grant to a wage earner or an individual receiving salary, commission or other remuneration, or to his relatives, heirs or dependents, as the case may be, a right of action, or a pecuniary compensation or other benefit or service, on account of occupational disease, injury or death arising out of and in the course of employment or due to the nature of employment.

The court pointed out that if the widow had been a United States citizen, "she would have been entitled to receive the weekly sum awarded during widowhood with two years' compensation in one sum upon remarriage . . . or, in the event of commutation, the full present value of the award," and that if the daughter were a citizen of the United States, "she would have been entitled to receive the weekly sum awarded until she reached eighteen years or, in the event of commutation, the full present value of the award," and went on to say:

To award to these non-resident alien dependents only one-half of the present value of such awards is obviously treatment different from and less favorable than that accorded nationals of the United States. The Board's contention that the commuted awards may "quite pos-

¹ 63 Stat. 2272.

sibly" constitute treatment "more favorable than that accorded nationals of the United States" rests upon the supposition that *perhaps* the widow or child may not live as long as the actuary tables indicate or that the widow may be the one of approximately five hundred widows of her age who will remarry. See, Remarriage Tables, Dutch Royal Insurance Institution. In attempting to anticipate the future of the widow and child, it seems to us better to be guided by accepted statistics than to resort to speculation. Such statistics indicate little likelihood of the occurrence of any of the "possibilities" that the Board must have considered.

The court further rejected the argument that section 17 of the New York Workmen's Compensation Law is not discriminatory "because it applies not only to non-resident alien dependents of a deceased alien-employee but also to non-resident alien dependents of a deceased citizen-employee," saying:

However, the rights of dependents to death benefits are created by law and not derived from any right conferred upon a deceased employee. . . . The benefits accrue not to the deceased employee or his estate but directly to his dependents. The comparison to be made should be as to the treatment of non-resident Italian dependents and dependents who are United States nationals. When that is done, we find the treatment of non-resident Italian dependents less favorable and, therefore, in violation of the Treaty.

Noting that a treaty is the supreme law of the land and that the treaty-making power extends to all proper subjects of negotiation "between our government and other nations," the court continued:

The provision of the Treaty previously set forth contains subject matter proper for negotiation between sovereign governments and, as the Treaty is self-executing, it operates without the need of any legislation. Hence, it must be applied and given authoritative effect by the courts of this State. . . . In the circumstances of this case, section 17 of the Workmen's Compensation Law is inconsistent with the Treaty and must give way to superior national policy. To comply with such policy, the Workmen's Compensation Board must award the funeral expenses to the person entitled thereto and the periodic compensation benefits to the widow and minor child as prescribed by paragraph 2 of section 16 of the Workmen's Compensation Law or, if the Board deems it advisable to commute the periodic payments pursuant to section 25, it must cause to be paid the full present value of the awards in one or more lump sum payments as it would do for citizens.

NOTE: This decision was followed in *Viselli v. Martino*, 140 N.Y.S. 2d 643 (N. Y. Sup. Ct., App. Div., 3d Dept., May 11, 1955).

Relation of international law and municipal law—treaties—courts of India—state succession—private rights—international personality
D. D. CEMENT CO. v. COMMISSIONER OF INCOME TAX. All India Rep. 1955 Pepsu 3.

India, Pepsu High Court, June 7, 1954. Chopra, J.

Applicant company entered in 1938 into an agreement with the ruler of Jind State whereby it was granted, *inter alia*, a monopoly of cement production and the right not to be assessed income taxes above a stated

rate. In 1948 the ruler of Jind and seven other rulers entered into a Covenant agreeing to integrate their territories into a new state to be known as Patiala and East Punjab States Union (Pepsu) and to make over the administration of their respective states to the government of the new state. The Covenant provided in part that "all duties and obligations of the Ruler pertaining or incidental to the Government of the Covenanting State shall devolve on the Union and shall be discharged by it." Subsequently, the Government of Pepsu ordained that the laws of Patiala State were to replace those of the other Covenanting States, and the applicant company was thereupon assessed income tax under Patiala law at a rate in excess of that under its agreement with Jind State. The company claimed that the tax should be reduced to the maximum permissible under the agreement, arguing, *inter alia*, (1) that the Act abrogating, in effect, the terms of the agreement was "*ultra vires* the Covenant" which was the source of the legislative power of the Pepsu Government, since the obligation not to charge a tax above the agreed rate devolved by virtue of the Covenant on the Union, and (2) that the Act did not recognize the general principles of international law.

The court, rejecting both arguments, held the assessment under the new law valid. It considered the nature of the Covenant and concluded that the latter was a treaty, and as such not enforceable by a municipal court. The court said in part:

It [the Covenant] embodies the terms on which the Rulers agreed and decided to unite or federate and bring into existence a new International Persona [*sic*]. This is one of the circumstances under which a State personality breaks or ceases to exist and the results in such a case are not materially different from those which flow when a sovereign State cedes to or is subjugated by another sovereign State. The Instrument of Accession executed in any of the circumstances is generally known as a treaty and recognized as an act of State. . . . It is not within the province of municipal courts to enforce or grant relief in respect of rights, howsoever forceful, reasonable and equitable they may appear to be, arising out of a treaty. The transactions of independent States between one another are governed by other laws than those which municipal courts administer, and rights supposed to be acquired thereunder cannot be enforced by such courts. Relief in such cases has to be sought not in the precincts of law courts "but along the corridors of diplomacy." The rights against the previous sovereign ceased to exist. Legally enforceable rights against the new Sovereign are those and only those which that Sovereign by subsequent agreement or recognition, express or implied, or by legislation chooses to confer. Any obligation assumed under the treaty either to the ceding Sovereign or to individuals is not one falling under this category.

Turning to the argument based on general principles of international law, the court said in part:

Under the international law, obligations of the successor State with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are widely different from the obligations which arise in respect of personal rights by contracts. As regards the

contractual obligations of the ceding State it is for the new State to consider and decide which of them it is prepared to recognize and which others to repudiate. The principles of international law, as enunciated by the various authorities, do not insist on their wholesale recognition by the conquering or annexing State. In any case, legislation otherwise validly made and promulgated by the new State cannot be regarded as invalid or inoperative merely because it is not in consonance with or contravenes such supposed principles of international law, and no relief on that account can be granted by the municipal courts to persons adversely affected thereby.

The court supported its conclusions by an extensive review of British and Indian decisions, opinions of writers, and other authorities.

NOTE: A right to use irrigation water in perpetuity without payment of water rates, granted to petitioner's father by the ruler of Nabha State by private statute, was held enforceable as against the successor Pepsu State because failure to demand payment of water rates over a period of four years implied recognition of the right by the new sovereign. *S. Mihan Singh v. Sub-Divisional Officer*, All India Rep. 1955 Pepsu 20 (May 3, 1954).

Sovereign immunity—international law in Berlin courts—real property—use for diplomatic purposes—immunity from execution of judgment—status of Latvia—recognition—Allied occupation of Berlin—restitution law

MRS. J. W. v. REPUBLIC OF LATVIA.¹

Germany, (West) Berlin, Kammergericht, 15. Zivilsenat, Feb. 25, 1955.

Plaintiff brought a restitution action against the Republic of Latvia, claiming real property in Berlin which she sold in 1939 because of racial persecution. An appeal from a decision in plaintiff's favor² was rejected. The appellate court held that whether or not Article 25 of the Constitution of the German Federal Republic was in effect in Berlin, the Berlin courts must apply international law in problems of extraterritoriality and domestic jurisdiction. In international law, there are two theories of sovereign immunity—the theory of absolute immunity and the restrictive theory of differentiation. According to the latter, there is no immunity where the foreign state enters the sphere of private law. The courts tend to embrace this theory to an increasing extent. "This has become a necessity, since states are increasingly active in the field of private law, especially in commercial relations." The restrictive theory was accepted by the Austrian Supreme Court in a decision of May 10, 1950, after a thorough review of cases in various countries. German courts are also lately inclined to adopt this theory. The court went on to say:

When acquiring real property, the foreign state enters into the private sphere. Furthermore, embassy buildings and residences of the diplomatic representatives are not part of foreign countries; they are

¹ Digested from translation of decision made available by Mr. Paul Reiner of the New York Bar.

² 48 A.J.I.L. 161 (1954).

part of our country. The law only provides that these localities basically must not be entered against the will of those having rights, since one must not interfere with the diplomatic activities. This, however, applies only to those localities which the extraterritorial persons actually use, a temporary interruption of their use being immaterial. The mere acquisition for embassy purposes of a building does not create extraterritoriality until the building is put to use for embassy services.

Holding that these rules applied also under the Restitution Law, which was enacted by the Occupying Powers, the court referred with approval to "the prevailing theory of international law which permits execution of a judgment whenever the foreign state is subject to the domestic jurisdiction," and pointed out that the property in litigation had not been used by Latvia since the Soviet occupation of that country. It went on to say:

In view of the general situation, it cannot be assumed that the building will be made use of by the defendant again for diplomatic purposes in the foreseeable future. It is, therefore, impossible to say that the interruption of the use for diplomatic purposes of the building is of temporary character only. We confirm, therefore, the opinion of the Landgericht that the land is subject to the restitution jurisdiction, since, at the present time, it neither serves diplomatic purposes nor will it serve such purposes in the foreseeable future. . . .

The court then considered the question whether the Republic of Latvia, after its incorporation into the U.S.S.R., was still a suable person, and gave an affirmative answer, since a Latvian Government in Exile existed in London with the consent of the host country, and since the United States continues to recognize the Republic of Latvia and its representatives. The latter fact is decisive, since the property in litigation is situated in the American sector of Berlin, where the United States exercises supreme power by right of occupation. Defendant, moreover, was properly represented in these proceedings under the authority of the senior Minister of Latvia in London who was recognized by the United States as entitled to represent his country.

The court then considered the merits of the claim and held that restitution was due. Under the circumstances of the case, the payment of the purchase price in British currency outside of Germany did not adequately protect the claimant's interests within the meaning of the Restitution Law. Also, despite the devaluation of the British pound since 1939, the claimant was not required to return a higher amount in pounds than that which she received in 1939 as the purchase price.

Territorial sea—high seas—jurisdiction over whaling—Peru

CASE OF SAUGER ET AL.¹

Peru, Port Officer of Paita, Nov. 26, 1954.

Summary proceedings were instituted on November 17, 1954, against the masters of five vessels for breach of certain provisions of the Peruvian

¹ Digest prepared on the basis of a translation made by Miss Rosa Amada Segarra from text in Enrique García Sayan, *Notas sobre la Soberanía Marítima del Perú—*

Port Authorities and National Merchant Marine Regulations approved by Supreme Decree No. 21 of October 21, 1951. The essential facts as found by the court were as follows: A whaling fleet consisting of at least 11 ships was sighted by units of the Peruvian Navy in a position 110 miles from the Peruvian coast. Two of the whalers were captured at a distance of 126 miles from the Peruvian coast and three vessels were intercepted later when they took to flight. The whalers were forced to stop by "warning measures," which caused neither damage nor casualties, after they had failed to obey orders to stop. None of the masters was able to produce ship's logs, engine-room logs or charts, whaling registers or whaling schedules. The court stated in part:

5. It has also been proved that the arrested ships and those which made off had operated within Peruvian territorial waters and had taken between 2,500 and 3,000 whales. . . . The fact that the Olympic Challenger was captured outside the 200-mile limit does not weaken that evidence in any way, for those depositions show that when the mother-ship received word of the capture of the first two of the ships just mentioned she proceeded continuously for 24 hours at high speed with special precautions, so that she was able to leave the zone and reach the point from which she was obliged to return and be impounded in this port. The Olympic Challenger was the ship which directed the catchers and gave them their bearings, and received and processed the catch taken within the 200-mile limit: about 6,800 tons of whale oil was found in her tanks.

6. Hunting and fishing in territorial waters is permitted only to Peruvian nationals and to aliens domiciled in the Republic, by article 731 of the Port Authorities Regulations. Foreign vessels are not permitted to fish in territorial waters. Whaling and the commercial utilization of its products are industries which may be carried on by any citizen of the nation or by any alien domiciled in Peru subject to the provisions of the existing statutes and regulations. Individuals and commercial undertakings intending to engage in these industries are required to apply to the Supreme Government for a license to do so; and for whaling it is necessary to apply for a special concession under articles 740, 742 and 743 of the Port Authorities and National Merchant Marine Regulations. The captains and agents of the arrested ships had acted in full knowledge of the declaration of the maritime zone published by Peru, Chile and Ecuador in 1952, but none of them had obtained such a license or special concession.

7. The Supreme Decree of 1 August 1947 . . . lays down that national sovereignty and jurisdiction are to be extended over the sea adjoining the shores of the national territory, whatever its depth and in the extension necessary to preserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters. These provisions are in harmony with those of the declaration of the maritime zone signed by Peru, Chile and Ecuador on 18 August 1952, to ensure the conservation and protection of their natural resources and to regulate the use thereof to the greatest possible advantage of each country; hence it is likewise the duty of each Government to prevent the said resources from being used outside the

Defensa de las doscientas millas de mar peruano ante las recientes transgresiones (Lima, 1955), reviewed below, p. 593. Text also in 14 *Rev. Peruana de Der. Internacional* 263 (1954), with related documents.

area of its jurisdiction so as to endanger their existence, integrity and conservation to the prejudice of peoples so situated geographically that their seas are irreplaceable sources of essential economic materials. . . .

8. . . . article 764 of the Port Authorities Regulations . . . [lays] down that any person or undertaking intending to fish or hunt either in coastal or in deep waters shall be required to apply to the Supreme Government for a license. This provision . . . applies to individuals and bodies corporate, national and alien, whether domiciled in Peru or not, operating within or outside territorial waters; for the expression "deep water" hunting and fishing is expressly defined in article 735 of the Regulations as hunting or fishing carried on outside the territorial waters of the Republic . . . this requirement of a license . . . in the present case was not complied with. . . .

10. In this case not only has a breach of the Port Authorities Regulations been committed, but there has also been evasion of payment of dues and the provocative attitude of the masters and of the persons who have instructed them to trespass in territorial waters. They were debarred from entering these because it was common knowledge that they had had notice of the prohibition by Peru of encroachment on her waters. Although these circumstances have not been a subject of examination, in these proceedings, they constitute circumstances aggravating the offense charged.

11. By article 33 port officers are empowered to punish offenses against the Regulations by the penalties and in the manner set forth in that article. Article 34 lays down that any offense for which the Regulations do not expressly provide a penalty shall render the offender liable to a fine proportional to the gravity of the offense.

12. The act charged is an offense against the Regulations, punishable under the two articles just cited by a penalty appropriate to the gravity of the offense itself and also to the numerous attendant circumstances, including the use and deployment of units of the Navy and Air Force to put down the offense.

The court accordingly ordered the five masters and the owners of the arrested ships to pay "jointly and in common" a fine of \$3,000,000 "or its equivalent in the national currency" within five days; the ships to remain impounded as security for the payment of the fine and to be released upon its payment in full.

NOTES

United Nations Charter—effect in American law—human rights

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, May 9, 1955, the U. S. Supreme Court, per Frankfurter, J., referring to its prior decision by an evenly divided court, 348 U. S. 880, 75 S. Ct. 122, affirming by necessity a decision of the Supreme Court of Iowa rejecting the contention that the United Nations Charter forbade giving effect to a restrictive contract clause as a defense in an action growing out of denial of burial privileges to an American Indian,¹ said in part:

The Iowa courts dismissed summarily the claim that some of the general and horatory language of this Treaty, which so far as the United States is concerned is itself an exercise of the treaty-making

¹ 48 A.J.I.L. 159 (1954).

power under the Constitution, constituted a limitation on the rights of the States and of persons otherwise reserved to them under the Constitution. It is a redundancy to add that there is, of course, no basis for any inference that the division of this Court reflected any diversity of opinion on this question.

Sources of international law—treaties—salvage of seaplane

Holding that "a seaplane when on the sea is a marine object which is subject to the maritime law of salvage" in a case involving salvage of a private American seaplane by a Polish vessel on the high seas, the U. S. Court of Appeals, 2d Cir., relied in part on Article 26 of the Havana Convention on Commercial Aviation of 1928 (47 Stat. 1901) and on provisions in the Paris Air Navigation Convention of 1919 and the [unratified] Brussels Convention of 1938 on Salvage of Aircraft at Sea, saying:

Although no international convention appears to control our decision here, we think it well worth noting that there is this highly reputable consensus [*sic*] of thought expressed by those participating in the development of international law. . . .

Lambros Seaplane Base v. The Batory, 215 F. 2d 228 (2d Cir., Aug. 17, 1954).

War—determination of existence—termination—enemy property—leases—insurance—criminal law

In *National Savings and Trust Company v. Brownell*, 222 F. 2d 395 (Dist. of Col., March 3, 1955, cert. den. June 6, 1955), it was held that certain orders made in February and May, 1951, vesting enemy (German) property were valid, since the Constitutional war power had not terminated despite prior cessation of hostilities, neither Congress nor the President having declared the end of the war.

"Duration of the war," as used in certain leases executed in July and August, 1945, was construed not to extend beyond the formal surrender of Japan on September 2, 1945. *Syquia v. U. S.*, 124 F. Supp. 638 (Ct. of Cl., Oct. 5, 1954).

The United States was held to be a "country at war" during the Korean conflict within the meaning of an exclusion clause in a life insurance policy, the court saying in part:

The purpose of a war service clause is to define a risk and exclude it from the general coverage of the policy. If "war" is given its ordinary, popular meaning, liability is determined by actual combat, a factor which naturally affects the risk; if given its strict, constitutional meaning, liability is determined by a formal declaration which, unless coupled with actual combat, does not increase or decrease the risk. In the light of the apparent object of the clause, we conclude that the parties did not intend to have the language used, construed in its strict, technical sense.

Christensen v. Sterling Insurance Company, 284 Pac. 2d 287 (Sup. Ct. of Wash., Dept. 2, May 26, 1955).

To the same effect: *Lynch v. National Life and Accident Insurance Co.*, 278 S.W. 2d 32 (Mo., St. Louis Ct. of App., April 19, 1955).

Possession of a certain flag on April 29, 1946, was held to be possession of an enemy flag during "existence of war" between the United States and Japan within the meaning of a penal statute. *Hawaii v. Yamamoto*, 39 Hawaii 556 (Sup. Ct. of Hawaii, Oct. 29, 1952).

Vesting of German property after termination of war—Joint Resolution of Oct. 19, 1951—Constitutional war power—due process

In *Ladue & Co. v. Brownell*, 220 F. 2d 468 (7th Cir., March 18, 1955), the court held that German property could be validly vested in 1951 despite the formal termination of the war by the Joint Resolution of October 19, 1951, since the power to seize such property was expressly reserved and extended by the Joint Resolution and was within the Constitutional war power; consequently, it was not a denial of due process.

For other American decisions dealing with enemy property see: *Bantel v. McGrath*, 215 F. 2d 297 (10th Cir., Aug. 18, 1954, rehearing den. Sept. 29, 1954); *Brownell v. Schering Corporation*, 129 F. Supp. 879 (D. New Jersey, March 21, 1955); *Pedersen v. Brownell*, 129 F. Supp. 952 (D. Oregon March 23, 1955); *Brownell v. National City Bank*, 131 F. Supp. 60 (S.D.N.Y., May 3, 1955); and *In re Zimmerman's Estate*, 283 Pac. 2d 68 (Calif., Dist. Ct. of App., 3d Dist., May 3, 1955).

Status of Filipinos in the United States—exclusion of aliens entering U. S. from Alaska

A Filipino residing in the United States since 1928 lost his United States nationality when the Philippines became independent in 1946; but, although convicted in 1948 of a crime involving moral turpitude, was not excludable as an inadmissible alien under Sec. 212 (d) (7) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1182 (d) (7), after a visit to Alaska for seasonal employment, since the provision was not intended to apply to an alien permanently residing in the United States who goes to a territory for temporary employment and then seeks to return. *U. S. v. Boyd*, 222 F. 2d 445 (9th Cir., May 10, 1955).

Status of Wake Island—U. S. immigration law

Arrival at Honolulu from Wake Island is not "entry" into the United States, since Wake Island is not a foreign port or place nor an outlying possession of the United States within the meaning of the Immigration and Nationality Act of 1952. *U. S. v. Paquet*, 131 F. Supp. 32 (D. Hawaii, May 23, 1955).

International claims commissions—attorney's fees

For a case involving a claim for attorney's fees for services rendered before the General Claims Commission, United States and Mexico, and

American-Mexican Claims Commission, see *Jones v. Pearce*, 277 S.W. 2d 934 (Texas, Ct. of Civ. App., Austin, March 30, 1955, rehearing den. April 20, 1955).

Consuls—basis of powers—representation of nationals—recognition by receiving state

In *In re Bedo's Estate*, 136 N.Y.S. 2d 407 (Surr. Ct., Bronx Co., Jan. 7, 1955), the court held that attorneys retained by a foreign consul must furnish proof of his recognition by the Department of State and not merely of the commission issued by his own government, but rejected the contention that in the absence of a treaty a consular officer of Czechoslovakia has no authority to appear for his nationals, saying in part:

The rights, powers and duties of consuls and consular officers rest on international law as well as on statute, regulation and treaty stipulations. . . .

Our courts have consistently given recognition to the power of a foreign consular officer recognized by our government to assert or defend the property rights of his nationals irrespective of whether or not he has been accorded the right to represent them in court by provision of treaty or otherwise. . . .

Enemy aliens—distribution of estates—effect of Brussels Agreement

The distributive share of a resident of Germany was held payable directly to the state of The Netherlands, decedent's domicile, pursuant to the Brussels Agreement of Dec. 5, 1947,¹ made under statutory authority. In *re De Moor's Estate*, 139 N.Y.S. 2d 381 (Surr. Ct., N. Y. Co., March 11, 1955).

Nationalization of foreign bank—receivership in New York—effect of International Monetary Fund Agreement

In an action seeking to place the assets of an allegedly nationalized Czechoslovak bank into receivership under Sec. 977-b of the New York Civil Practice Act, the court ordered a trial of the issue whether the bank was still in position to meet its obligations, but held that since the withdrawal of Czechoslovakia from the International Monetary Fund, as shown by a press release of the Fund and a letter from the Department of State, Article VIII, Sec. 2(b), of the Fund Agreement no longer barred plaintiffs in this action. *Stephen v. Zivnostenska Banka, National Corp.*, 140 N.Y.S. 2d 323 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., March 25, 1955).

Distribution of estates—beneficiaries in Hungary—consuls

Ordering the distributive shares of residents of Hungary (represented by the Hungarian Consul) in the estate of a testatrix in New Jersey paid into probate division of the county court under a statute authorizing such

¹ U. S. Treaties and Other International Acts Series, No. 2230.

action where it appears that a legatee or next of kin would not have the benefit or use or control of the money or property, the court noted that application for distribution may be renewed at any time, and said:

Pending that renewal, *inter alia* it is hoped that counsel will make inquiries concerning the currency exchange rate between this country and that of Hungary, and the attitudes of the Department of State and Attorney-General.

In re Valencki's Estate, 114 A. 2d 26 (N. J., Mercer County Ct., Probate Div., May 11, 1955).

AMERICAN CASES ON NATIONALITY

Naturalization. *U. S. v. Menasche*, 348 U. S. 528 (U. S. Sup. Ct., April 4, 1955) (effect of saving clause of Immigration and Nationality Act of 1952 on naturalization proceedings); *Pons v. U. S.*, 220 F. 2d 399 (1st Cir., March 22, 1955) (ineligibility by reason of exemption from military service; effect of treaty of 1902 with Spain); *Bannout v. Brownell*, 129 F. Supp. 488 (Dist. of Col., March 8, 1955) (action for declaratory judgment to establish eligibility); *Petition of Scaccio*, 131 F. Supp. 154 (N.D. Calif., S.D., April 25, 1955) (ineligibility of conscientious objector).

Actions to declare citizenship or for habeas corpus—jurisdiction, procedure and evidence. *Lue Chow Kon v. Brownell*, 220 F. 2d 187 (2d Cir., March 10, 1955); *Lee Dong Sep v. Dulles*, 220 F. 2d 264 (2d Cir., March 10, 1955); *U. S. v. Shaughnessy*, 220 F. 2d 537 (2d Cir., March 15, 1955); *Ng Kwok Gee v. Dulles*, 221 F. 2d 942 (9th Cir., April 25, 1955); *Correia v. Dulles*, 129 F. Supp. 533 (D. Rhode Island, March 29, 1954); *Ly Shew v. Acheson*, 131 F. Supp. 113 (N.D., Calif., S.D., April 1, 1955); *Ah Kong v. Dulles*, 130 F. Supp. 546 (D. New Jersey, April 7, 1955); *Lee Shew v. Brownell*, 130 F. Supp. 454 (N.D. Calif., S.D., April 11, 1955).

Denaturalization. *Lansky v. Savoretti*, 220 F. 2d 906 (5th Cir., March 30, 1955) (subpoena requiring testimony of citizen under investigation); *Carroll v. Savoretti*, 220 F. 2d 910 (5th Cir., March 30, 1955) (privilege against self-incrimination); *Baghdasarian v. U. S.*, 220 F. 2d 677 (1st Cir., April 13, 1955) (insufficiency of evidence); *U. S. v. Condeila*, 131 F. Supp. 249 (S.D.N.Y., Oct. 14, 1954, rehearing den. Nov. 24, 1954) (necessity of affidavit of good cause).

Expatriation. *Dulles v. Iavarone*, 221 F. 2d 826 (Dist. of Col., Dec. 16, 1954) (father's naturalization abroad, failure to acquire U. S. residence before age of 23); *Alata v. Dulles*, 221 F. 2d 52 (Dist. of Col., Jan. 27, 1955) (involuntary oath of allegiance to foreign state); *Augello v. Dulles*, 220 F. 2d 344 (2d Cir., March 9, 1955) (involuntary oath of allegiance to foreign state); *Yoshio Murakami v. Dulles*, 221 F. 2d 588 (9th Cir., April 13, 1955) (voluntary renunciation in relocation center); *Covmas v. Brownell*, 222 F. 2d 331 (9th Cir., May 9, 1955) (voluntary oath of allegiance to foreign state, residence for two years in country of birth).

Extradition—United States and Canada—mail fraud—double criminality—validity of Extradition Convention of 1951

The Superior Court of Quebec, Canada, refused extradition of two Canadians indicted in the United States for violating the Federal mail fraud statute and the Securities Act of 1933 by fraudulent solicitation by telephone and mail from Canada of orders for securities. The extradition was sought under the provisions of the Supplementary Extradition Convention of 1951 between Canada and the United States¹ which added two numbers to the list of extraditable offenses. The court, referring to the principle of double criminality, held that number 11A, dealing with frauds in general, did not contemplate indictments under the United States mail fraud statute and the Securities Act, the only Canadian counterpart of which was a mail fraud clause in the Criminal Code, and that the charge was not within the mail fraud (11B) number, since it involved telephone calls. It was unnecessary, the court added, to pass on the validity of the supplementary convention, which was executed not in the name of Her Majesty, as prescribed by Sec. 2(b) of the Canadian Extradition Act, but between "Canada and the United States of America." *U.S.A. v. Link and Green*, Dec. 17, 1954, 21 Crim. Rep. 177; leave to appeal denied by Supreme Court of Canada. (For a note see 68 Harv. L. Rev. 1463 (1955).)

Foreign armed forces—privileges and immunities—U. S. base in Canada—NATO Status of Forces Agreement

The Supreme Court of Newfoundland, Canada, affirmed a decision on circuit² dismissing an action for libel against the Commander of the United States Air Force Base in Newfoundland which grew out of the preparation and distribution to servicemen of a booklet listing plaintiff's premises as off-limits. The court held the occasion to be one of qualified privilege, there having been no malice or negligence on defendant's part in letting the booklet fall into the hands of civilians. It also indicated that provisions of Article VIII, Clauses 5(a) and (c), of the NATO Status of Forces Agreement concerning civil claims incorporates "the existing law," foreign forces in Canada standing for this purpose in the same position as Canadian forces. *Gallant v. West*, Jan. 17, 1955, 36 M.P.R. 14.

Treaties—ratification—entry into force—interpretation

In *Debendra v. Amarendra*, All India Rep. 1955 Calcutta 159, Aug. 25, 1954, the Calcutta High Court, India, held that Chandernagore became Indian territory on June 9, 1952, the date of exchange of ratifications of the treaty of cession of February 2, 1951, between India and France. Article XII of the treaty provided in part: "This Treaty shall come into

¹ U. S. Treaties and Other International Acts Series, No. 2454.

² 49 A.J.I.L. 412 (1955).

force on ratification by the governments concerned, the instruments of ratification being exchanged in Paris." ¹

Treaties and municipal law—Austrian courts—interpretation—railways

The Austrian Supreme Court held that the International Convention on the Transport of Goods by Rail prevailed over inconsistent provisions of an Austrian law which came into force on the same day (Oct. 1, 1938), referring, *inter alia*, to the preparatory work of the convention. Decision of Dec. 2, 1953, 82 Journal du Droit Int. (Clunet) 175.²

Austria—status—prewar treaty with France

In two recent decisions French courts held that Austrian nationals were exempt under a Franco-Austrian treaty of 1925 from the requirement of *cautio judicatum solvi*, on the authority of letters from the Ministry of Foreign Affairs to the effect that Austria was not at war with France and that in the Declaration of Moscow of 1943 the four Allied Powers had undertaken to consider the German annexation of Austria null and void. 82 Journal du Droit Int. (Clunet) 165 (with a note by J. B. Sialelli in which recent French decisions concerning the status of Vietnam and Belgian Congo are mentioned).

Treaties—interpretation—French courts

For decisions of French courts concerning the binding force of interpretation of treaties by the French Government, see 43 Rev. Critique de Droit Int. Privé 771, 778 (1954).

Treaties—effect of war—international aviation—Warsaw Convention—Germany

In a case growing out of delay in the delivery of goods shipped by air from West Germany to Italy, the Landgericht of Hamburg, West Germany, regarded the Warsaw Convention ³ applicable, since the convention, which Germany ratified in 1933, was part of German law. It was not necessary to decide, the court said, whether the convention was in force during the war; since the end of the war it has been in force between West Germany and various other states as shown by declarations of the contracting states. (The court did not mention the fact that Italy, which went to war with Germany in 1943, was not one of the states with which the West German Government had made arrangements for the renewed application of the convention.) *Scandinavian Airlines System v. Firma Oskar Wucherpfennig*, April 6, 1955, 4 Zeitschrift für Luftrecht 226 (1955). (A note by Alex Meyer is appended to the report of this case.)

¹ Text in Indian Year Book of International Affairs, 1953, p. 323.

² See article by Seidl-Hohenveldern, above, at p. 461, note 75.

³ 49 Stat. 3000.

State succession—treaties—Indonesia—extradition—treaties in British courts—effect of Foreign Office statement

The High Court of Singapore held on Aug. 15, 1950, that a request of the Republic of the United States of Indonesia for the extradition of one Westerling could not be granted. Although the court, with some reluctance, accepted as binding a statement by the Attorney General on the authority of the Foreign Office that the Republic had succeeded to the rights and obligations of the Kingdom of The Netherlands under the Anglo-Netherlands Extradition Treaty of 1898 in respect of Indonesia, the Republic was not named in any Order in Council as a state to which the British Extradition Act of 1870 applied, as required by that Act. Without such an Order the treaty was inoperative. For text of the decision see R. W. G. de Muralt, *The Problem of State Succession with Regard to Treaties* 146 (1954).

Former Italian colonies—jurisdiction of Italian courts—Eritrea

The Italian Court of Cassation, United Sections, held on March 3, 1953, that it had no jurisdiction to review, on a petition lodged in January 1952, a decision of the Court of Appeal of Asmara, Eritrea, since Italian judicial jurisdiction in Eritrea terminated as of Sept. 15, 1952, when the Ethiopian-Eritrean federation was proclaimed. *Passi v. Sonzogno*, 37 Riv. di Dir. Int. 579 (with an extensive note by Pasquale Paone).

Trust territories—Somaliland—appellate jurisdiction of Italian court—powers of administrator

In a decision of Aug. 10, 1954, the Italian Court of Cassation, United Sections, upheld the validity of an ordinance of the Italian Trust Administrator of Somaliland dated April 12, 1950, providing for appeals from judicial decisions in Somaliland to the Court of Appeal in Rome, and its applicability to decisions rendered prior to April 1, 1950, the date on which the administration of the territory was transferred to Italy. In its opinion, the court discussed at length the legal nature of the trusteeship and the powers of the Administering Authority. 38 Riv. di Dir. Int. 76.

High seas—Italy—absence of power to grant exclusive concessions—taking possession of abandoned property

In acquitting defendants of a charge of theft, the Tribunal of Trani, Italy, held that they committed no crime in dragging from the bottom of the sea 22 miles off the Italian coast certain munitions of war abandoned by the Allies, since neither by international law nor by Italian law was the Italian state entitled to these objects or authorized to grant an alleged exclusive concession for the recovery of such objects on the high seas; the only way to acquire title to such objects being through occupation, *i.e.*, taking of possession coupled with *animus occupandi*. *Case of Gasparoni et al.*, June 19, 1952, 38 Riv. di Dir. Int. 90.

Sovereign immunity—waiver

The Dominion of India was held to have waived immunity by appearing and pleading on the merits in a suit in a court of Bharatpur State. *Dominion of India v. Matoliram*, All India Rep. 1955 N.U.C. 312 (Rajasthan, Jaipur Bench, April 21, 1952).

Diplomatic immunities

Upholding the immunity of the Saudi Arabian Minister in Rome from suit in Italian courts, the Tribunal of Rome discussed and distinguished the immunities of diplomatic representatives in their personal and official capacities. *Soc. Vivai Industriali Roma v. Legazione dell'Arabia Saudita*, Nov. 20, 1953, 38 Riv. di Dir. Int. 80. (A note by Antonio Malintoppi is appended to the report of this case.)

The Argentine Supreme Court held that diplomatic immunity was not to be granted unless it was invoked by the foreign government. *Case of Scarponi, Bruno et al.*, May 5, 1952, 82 Journal de Droit Int. (Clunet) 199.

For a statement on behalf of the French Government concerning diplomatic immunities, see 42 Rev. Critique de Droit Int. Privé 892 (1954).

Foreign acts of state—confiscation—French courts

An attempt by the daughters of a Russian art collector, whose collection was nationalized by the Soviet authorities in 1918, to have a part of the collection, brought to Paris for exhibition, sequestered pending determination of title, was unsuccessful in a French court. *De Keller v. Maison de la Pensée Française*, 82 Journal du Droit Int. (Clunet) 119 (Civ. Trib. of Seine, July 12, 1954). (A note by J. B. Sialelli is appended to the report of this case.)

Aliens—confiscation—taxation—expulsion

An Argentine court held invalid as confiscatory a succession duty of 54.77% affecting a non-domiciled foreigner. *Succession of Francisco Torrome*, 82 Journal du Droit Int. (Clunet) 209 (National Civil Chamber of Buenos Aires, July 16, 1954).

For an Indian case on expulsion of aliens see *Muller v. Superintendent*, All India Rep. 1955 S.C. 367 (Sup. Ct. of India, Feb. 23, 1955).

For a statement on behalf of the French Government concerning expulsion of aliens, see 44 Rev. Critique de Droit Int. Privé 206 (1955).

Belligerent occupation—Philippines—sale of land—duress

In *Fernandez v. Howard*, 11 Decision L.J. 228, the Philippine Supreme Court held, on Jan. 28, 1955, that there was no presumption of duress in the sale by an inhabitant of an occupied territory to the belligerent occupant of land needed by the latter for military purposes. The court reiterated its rejection of the theory of "collective" or "general" duress

allegedly exercised by the Japanese in the Philippines as a ground for invalidating acts that would otherwise be valid.

Status of the Republic of South Moluccas

The Republic of South Moluccas was held to have legal personality for the purpose of an interim order of protection in summary proceedings. *Republic of South Moluccas v. New Guinea and Naulohy*, 2 Nederlands Tijdschrift voor Internationaal Recht 209 (Netherlands, President of Court of First Instance, The Hague, Feb. 10, 1954).

Decisions of Indian courts—relation of international law to municipal law—status of Indian states—cession—state succession—criminal jurisdiction—extradition—nationality—territorial waters—bays—jurisdiction over chank fisheries—sovereign immunity—effects of war—private international law—constitutional law of India

Decisions of the courts of India on these subjects in 1950, 1951, 1952 and 1953 are digested in The Indian Year Book of International Affairs, 1952, pp. 269–286, and 1953, pp. 351–388.

BOOK REVIEWS AND NOTES

The British Year Book of International Law, 1953. H. Lauterpacht (editor). London, New York, Toronto: Oxford University Press, 1954. pp. viii, 592. Index. \$12.00.

What makes the annual appearance of the *British Year Book of International Law* so exciting an event and its perusal so rewarding an experience for international lawyers? Undoubtedly the imaginative planning and skilled editorial direction of Professor Lauterpacht should receive first mention. The roster of contributors includes distinguished international lawyers and newly discovered young talent. The selection of topics for treatment reveals a master hand. Each year scattered materials with which international lawyers have had some familiarity are gathered together for comprehensive and significant treatment. For example, in the current volume Mr. I. C. MacGibbon, in an article entitled "Some Observations on the Part of Protest in International Law," gives the first comprehensive analysis of a subject, not at all new, but which has become of increasing importance because of its treatment in several recent decisions of the International Court of Justice and in relation to extensive unilateral claims to the continental shelf and areas of the high seas. Reference should also be made here to the able discussion of the unhappily named concept of "judicial arbitration" by Mr. D. H. N. Johnson in his article on "The Constitution of an Arbitral Tribunal."

Another type of article characteristic of the *British Year Book* reveals a scholarly and enquiring mind probing accepted conclusions in the light of contemporary practice and emerging needs. Particular mention should be made of the fresh and original treatment by Mr. Wilfred Jenks of "The Conflict of Law-Making Treaties"; by Professor Lauterpacht of "The Limits of the Operation of the Law of War"; by Mr. H. Blix on "The Requirement of Ratification"; by Mr. A. B. Lyons on "Immunities Other Than Jurisdictional of the Property of Diplomatic Envoys"; of the examination by Mr. R. Y. Jennings of the so-called *inter se* doctrine in his "The Commonwealth and International Law." This last article and a more comprehensive one by Mr. Clive Parry on "Plural Nationality and Citizenship with Special Reference to the Commonwealth" deal with the complicated interrelationships of the categories of "British subject," "British citizen" and "British national" under current British and Commonwealth nationality legislation.

In other articles, Mr. S. W. Schwebel discusses "The International Character of the Secretariat of the United Nations"; Miss Alona Evans, "Self-Executing Treaties in the United States"; Mr. J. E. S. Fawcett, "The Legal Character of International Agreements"; Mr. A. R. Albrecht, "The Enforcement of Taxation under International Law." In a note Major R. R. Baxter discusses "Asylum to Prisoners of War."

Sir Gerald Fitzmaurice continues his series on "The Law and Procedure of the International Court of Justice," this time dealing with general principles and sources of international law in opinions of the Court from 1951 to 1954. His perceptive analyses relate opinions expressed by the Court or by its individual Judges to the main stream of international law and fully justify his method of discussing within a broad frame of reference questions of international law raised by the opinions of the Court, instead of confining himself to its sometimes narrow decisions. The eminence and authority of the Court are such that the value of its opinions on international law are not limited to the actual holdings of the Court in a particular decision or advisory opinion.

It may not be improper to express the hope that Judge Lauterpacht will be able to continue his outstanding work with the *British Year Book of International Law*.

HERBERT W. BRIGGS

An Introduction to International Law. (3rd ed.) By J. G. Starke. Toronto: Carswell Co.; London: Butterworth & Co., 1954. pp. xx, 514. Index. \$5.55.

The first edition of this book was issued in 1947, the second in 1950, and the third is some 200 pages larger than the first. The author, one-time member of the League of Nations Secretariat and Vinerian scholar at Oxford, has done a lawyer's, not a publicist's, text which benefits from originating in the last decade. The substance has been presented in an arrangement uncontrolled by old ideas of treatment. His six parts deal with international law in general, states as subjects of international law, rights and duties of states, international transactions, disputes and hostile relations (including war and neutrality), and international institutions. Theories are mentioned in order to reduce them to practical values, and the whole volume has the quality of precise legal statement in current terms. Of some 250 cases cited, 175 have been decided since 1920. It would be difficult to find a clearer and more accurate view of international law today than that afforded in these pages.

International law to Joseph Gabriel Starke (Why do untitled Britishers use only initials?) is a body of law "which states feel themselves bound to observe," including rules relating to international institutions or organizations and some relating to individuals and non-state entities. Rules are rules, whether derived from bilateral or multilateral sources. Monism and dualism, international and municipal conflicts, war and "nonwar" hostilities, different types of recognition and other controversial subjects are explained factually, not philosophically, and put in perspective. Full chapters are devoted to Relations between International Law and State Law, Recognition, Succession to Rights and Obligations, and Neutrality and Quasi-Neutrality. A 60-page chapter on International Institutions contains 25 pages descriptive of the United Nations, and the rest is a general summary of the structure and functioning of other organizations. These

bodies are "primarily the concern" of political science but they do "materially impinge upon the field of international law." They provide the international community with a constitutional framework, promotional in nature rather than operational, as are the states which compose them and with which they share juridical personality. They seem to provide administrative machinery for the states to work with and to facilitate legislative decisions of legal significance in the international community. Many will think that is too conservative a view of their relation to international law, but it is objectively precise.

DENYS P. MYERS

Conceptions Soviétiques de Droit International Public. By Ivo Lapenna. Paris: Editions A. Pedone, 1954. pp. 328. Index.

In order to grasp the Soviet conception of international law and to appreciate its significance, it is necessary to understand, at the least, (1) the Marxist theory of the state, law and morality; (2) the Soviet doctrine of international law; (3) the uses to which international law is put in Soviet policy and practice; (4) the principal non-Soviet conceptions of the state, law and morality; (5) the principal non-Soviet conceptions of international law; (6) the uses to which international law is put in the policies and practices of the non-Soviet world. Professor Lapenna's conscientious study is devoted primarily to item (2) in this list, and, by way of introduction, to certain aspects of item (1). Soviet practice is referred to but sporadically. The author explicitly states that his purpose is to give a concise but complete picture of the various tendencies in the development of the Soviet *theory* of international law, and goes so far as to remark that he has omitted, to the extent possible, works of a specifically political character, but that he has been unable to avoid touching upon political conceptions. The reluctance to utilize fully the relevant political materials, which is hardly consistent with the admission that Soviet theory is closely linked to politics, reduces the value of the book. Also, no attempt is made to relate the Soviet attitude toward international law to the Soviet conception of morality and its rôle in society.

Despite Professor Lapenna's inhibitions, his skill in selection and organization lets the materials speak for themselves. The book cannot but strengthen the impression that the Soviet attitude toward international law is highly pragmatic. International law is permitted to serve, but not to control, policy. Rules and precedents are invoked, ignored or reinterpreted freely, and often quite crudely, to suit the interests of the Soviet state. The lack of inhibitions with which this is done is bound to shock non-Soviet observers who believe in international law as an important limitation on policy. Yet this is hardly the point at which inquiry should stop. Much more should be done to find out how international law is used in Soviet policy, on what assumptions, and with what results; and how its use by the Soviets compares with its rôle in the policies of the non-Soviet world. Nor should the possibility that international law has some psychological impact on Soviet policy-makers be totally ignored.

Professor Lapenna's study stops with the end of the Stalin era. He regards 1938 as the time when the Soviet doctrine of international law emerged, under the guidance of Vyshinsky, from a period of confusion into relative stability and uniformity. Independent thinking on basic issues was no longer to be reflected in the literature. Yet doctrinal difficulties persist; it is still virtually impossible for Soviet jurists to fit international law into the orthodox Marxist conception of law. Recent reports indicate that discussions of this problem in Soviet literature continue unabated. Will the death of Stalin and Vyshinsky and the "new look" in Soviet policy, possibly with greater recognition of stability in the relations between the two worlds, bring about significant changes in Soviet doctrine? Past Soviet experience suggests that legal doctrine may lag several years behind new policies. The doctrine of 1938, with its ostensible recognition of possibilities of "collaboration" as well as "struggle" with capitalist governments, appeared to be a natural sequel to Soviet entrance into the League of Nations in 1934 and the attempts to form alliances against the Nazi-Japanese axis.

The last chapter of the first part of the book deals with the Soviet attitude toward the sources of international law; the second part is devoted to an examination of Soviet doctrine on selected specific topics, including international personality, diplomatic and trade representatives, recognition (on which some interesting ideas have been advanced by Soviet writers), sovereignty, intervention, territory, polar regions, treaties, and international organization. Much of this part is simply a digest of Soviet writings, some already obsolescent (*e.g.*, on the "continental shelf," reservations to treaties, and specialized agencies). It is regrettable that the law of war is not covered. The Stalinist doctrine of just war, with its sinister implications, is not even mentioned. Some important Soviet monographs (*e.g.*, Polyansky on "The International Court," and Levin on "Diplomatic Immunities") were apparently unavailable to the author. Lack of reference to Soviet practice makes some of the conclusions (*e.g.*, on the Soviet attitude toward codification) less convincing than they might be and exaggerates the significance of views expressed by Soviet writers as indicative of the official Soviet position on specific questions (as distinguished from basic doctrines).

The volume, which opens with a brief but thoughtful foreword by Professor Suzanne Bastid, is well edited. Errors of fact are very few and insignificant. It is a distinct, though limited, contribution to the Western understanding of Soviet ideology and doctrine in the field of foreign affairs.

OLIVER J. LISSITZYN

The Problem of State Succession with Regard to Treaties. By R. W. G. de Muralt. The Hague: W. P. Van Stockum & Zoon, 1954. pp. 168. Index.

The events of recent decades have lent added interest to the problem of succession to treaties. Doctor de Muralt's little book is a useful contribu-

tion to the elucidation of the problem, although, as he indicates, it is hardly a definitive study. It does not purport to be exhaustive in its coverage of the documentary material, and the author's positivism precludes more than sporadic evaluation of the practices and decisions in terms of their results. To a very large extent, the author presents and analyzes past practices already well known to international lawyers; "he has not aimed at covering all the cases." Perhaps the most important omission is that of the rich material to be found in the published records of international organizations. There are other obvious gaps. Such a significant and easily available document as the reply of the Government of Israel to the questionnaire of the International Law Commission (U.N. Doc A/CN.4/19, March 23, 1950) has apparently remained unknown to the author. There is no mention of materials in H. A. Smith's *Great Britain and the Law of Nations*. However, one little-known decision—that of the High Court of Singapore concerning the applicability to independent Indonesia of a British-Netherlands Extradition Treaty—is printed in full in an annex; and some other little-known sources are drawn upon.

The main categories used by the author to organize his materials are "extension of sovereignty and of administration," under which distinctions are made between "metropolitan cases" and "colonial cases" and between "treaties not of a local character" and "treaties running with the land," as well as between different types of administration, such as protectorates, mandates, etc.; "federation and dismemberment"; and "independence." As might be expected, the author's conclusions are avowedly tentative and not very original. On some points the law is conceded to be totally unsettled. An ambiguous attitude toward the relevance of the doctrine of changed circumstances contributes to Doctor de Murlat's inability to relate more fruitfully the problem under study to the broader considerations of the intentions and expectations of the parties and the functions of treaties in the relations between states. He suggests, however, the emergence of a rule which he regards as new and states as follows:

In cases where there exists a close relationship between the newly independent State and the old State the former has the choice between two ways of solving the problem of the binding force of the latter's treaties with third States. It can either assume the rights and obligations resulting from such treaties as allow of this construction, or it can refuse to accept them, except insofar as they result from treaties running with the land. The newly independent State is not allowed to accept treaties it considers useful and to reject others. It must either accept or reject them all, and the third States with which the treaties were concluded will be deemed to have acquiesced in its choice if no protest is lodged by them. (Page 141.)

For this rule he finds some "ethical and economic" justification as well as support in practice.

OLIVER J. LISSITZYN

Problema Territorialnykh Vod v Mezhdunarodnom Prave. By A. N. Nikolayev. Moscow: Gosudarstvennoye Izdatelstvo Yuridicheskoi Literatury, 1954. pp. 307.

The problem of territorial waters in international law is studied in this monograph from the Soviet point of view. All doctrines and practices are appraised with characteristic frankness in terms of the interests of the Soviet state. Political motives are imputed without hesitation even to the Judges of the International Court of Justice, whose decisions in the *Corfu Channel* case and the *Anglo-Norwegian Fisheries* case are critically analyzed.

Although the freedom of the seas is approved, more interest is shown in upholding (1) the freedom of each state to fix the limits of its territorial waters (taking into account, it is added, its own special circumstances as well as the needs of international navigation), and (2) the greatest possible freedom for each state to exercise its sovereignty in its territorial waters. These principles are said to be opposed by the United States, Great Britain and other strong maritime Powers of the "imperialist camp." Proposals to submit the problem of territorial waters or certain aspects of it to the decision of such bodies as the General Assembly of the United Nations or the International Court, in which there is said to be an "American-English" majority, are denounced as serving the interests of the "imperialist camp." Yet signs are seen of a rift in this camp; the fact that the American member of the International Law Commission (Hudson) opposed the three-mile doctrine and favored a maximum twelve-mile zone is regarded as perplexing but warranting the cautious conclusion that the United States is about to change its policy. The outcome of the *Anglo-Norwegian* case is construed as a victory for American over British influence. Furthermore, the smaller capitalist states are seen as being increasingly restive under the limitations on their sovereignty inherent in the doctrines upheld by the strong "imperialist" Powers.

Soviet territorial waters are a part of the territory of the U.S.S.R., are under its sovereignty and are its state socialist property. The width of Soviet territorial waters is at present 12 nautical miles. (Page 204.)

Although some ambiguity in Soviet legislation is recognized, the view of certain Soviet authors that the U.S.S.R. has no territorial waters as such, but only zones for specific purposes, is sharply rejected, and an effort is made to trace the 12-mile claim as far back in Russian history as possible. The U.S.S.R. makes no claims to contiguous zones beyond twelve miles, and such claims by other Powers are regarded as of doubtful validity unless sanctioned by international agreement. The problem of the continental shelf is expressly excluded from the scope of the discussion. The suggestion of other Soviet authors that four seas in the Arctic adjoining the Siberian coast—the Kara, Laptev, East Siberian and Chukot Seas—may be properly regarded as Soviet "historic bays" is approved; and it is recommended that consideration be given to measuring Soviet territorial waters in cer-

tain northern regions from the edge of stationary shore ice. Much emphasis is put on the term "territorial waters" as being preferable to "territorial sea."

"Innocent passage" is viewed coldly; approval is expressed of the idea, embodied in the Bulgarian law of 1951 on territorial waters, that foreign merchant vessels are entitled to passage through territorial waters only to the extent necessary in the normal course of navigation. Warships are denied the right of innocent passage. However, they are said to be entitled to extraterritoriality in foreign territorial waters and ports.

The wealth of material on Russian and Soviet legislation and practice makes the book particularly valuable to Western readers. Ample use is also made of non-Soviet primary and secondary sources, with special attention to attempts at codification under the auspices of the League and the United Nations. There are, however, strange gaps; for example, neither Jessup on *Territorial Waters* nor Riesenfeld on *Protection of Coastal Fisheries* is mentioned. The errors of fact include the attribution to the United States of a 12-mile fisheries zone. It is curious to find the Nyon Agreement of 1937 on the Suppression of Piracy during the Spanish Civil War listed as being still in force. Appendices contain apparently exhaustive lists of Soviet legislation, regulations and treaties bearing on territorial waters, translations of certain codification drafts, a comparative table of the Hague (1930) and Geneva (1952-1953) drafts on the law of the territorial sea, and an elaborate table of claims of all the countries of the world to territorial waters and contiguous zones, with a summary tabulation of the number of states making particular types of claims.

OLIVER J. LISSITZYN

Notas sobre la Soberanía Marítima del Perú: Defensa de las 200 millas de mar peruano ante las recientes transgresiones. By Enrique García Sayan. Lima: Talleres Gráficos P. L. Villanueva, 1955. pp. 62. Index.

This is a lawyer's brief in support of the Peruvian claim to a 200-mile zone written by the Minister of Foreign Relations at the time of the promulgation of the presidential decree of August 1, 1947, which first announced Peru's assertion of national sovereignty over the continental shelf. It is a very able brief.

In essence the Peruvian claim is supported on the strongest possible ground, namely, the national interest in the conservation of the natural resources of the adjacent seas and sea bed, coupled with a general right of self-preservation. The author points especially to the scientifically established dependence of the important guano industry upon the fish which are the food supply of the birds producing the guano. The usual interest of the coastal state in the products of the fisheries as a source of food for the population and in the exploitation of petroleum is also stressed. A parallel is found between Elihu Root's explanation of the legal basis of the Monroe Doctrine and Peru's assertion of its own right of self-defense.

It is argued that the attempt of the United States to distinguish between jurisdictional and sovereign rights is not sound in law or fact, but the fact that Peru claims sovereignty over the extended zone is not minimized. By referring to special claims (mainly jurisdictional in character) of other states, the author argues that the three-mile rule, if it ever was law, is clearly recognized to be outmoded and cannot be considered sacrosanct. He draws comfort from the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries* case, and especially, of course, from the separate opinion of Judge Alvarez. The recent Onassis and North American "tuna-clippers" cases are analyzed and two annexes give first a calendar of events in the Onassis case and then the judgment of the Peruvian court of November 26, 1954.¹ Other annexes contain the texts of the basic decree of 1947, the Petroleum law of 1952 (redefining the 200-mile zone), the Supreme Resolution of January 12, 1955, and the tripartite declaration of Chile, Peru, and Ecuador signed at Santiago on August 18, 1952. There is a brief index. This is a very useful little book for those who wish a better understanding of the basis of the claim of Peru and other countries.

PHILIP C. JESSUP

Limitation of Liabilities in International Air Law. By H. Drion. The Hague: Martinus Nijhoff, 1954. pp. xxvii, 389. Index. Gld. 24.50.

The rapid growth of air transportation and the continuing efforts to elaborate new conventions on private international air law make very timely the appearance of Mr. Drion's excellent commentary on the problems arising in connection with the limitation of liability of air carriers under the Warsaw Convention of 1929 and the Rome Conventions of 1933 and 1952. Since only the Warsaw Convention has been extensively ratified and applied in practice, it naturally receives the major share of attention.

Although the author makes no attempt to cover the entire contents of the three conventions, restricting his discussion to the provisions directly related to limitation of liability, his imagination and minute knowledge of the material lead him along many obscure paths not often trod by other writers. Yet there is nothing academic or impractical in his approach. Profiting by study in the United States and Canada as well as in Europe, and by personal participation as a Netherlands representative in international air law conferences, Mr. Drion shrewdly distinguishes problems that are likely to be of practical significance from those that are not, and concentrates on the former. His approach, however, is the opposite of pedestrian or provincial. The reader is not allowed to forget the larger issues of the public interest, and the author's field of vision is oecumenical in breath. He states that:

International air law has its aerial roots hanging down in the soil of as many national systems of laws as there are countries flown over by aircraft. . . . The real purpose of discussing national laws . . . can only be to cultivate a certain awareness as to the existence of possi-

¹ Digested above, p. 575.

bilities outside the sphere of one's own legal thinking, an awareness which is as essential for the intelligent interpretation of the air law conventions, as it is necessary for the handling of the day-to-day legal problems which arise out of international air transportation.

Mr. Drion has managed to collect and effectively present an amazing number of judicial decisions from some eighteen countries, as well as to draw upon a vast literature in many languages. He shows, furthermore, full appreciation of the importance of understanding the policies and the real meanings behind the decisions and the verbalizations. Conceptualism is rejected in favor of interpretations which accord proper weight to the general purposes of the conventions and the desirability of the results. Yet the author remains admirably objective.

The material is organized under the following headings: The grounds for limitation of liability in private air law; scope of application of the limitation of liability provisions; extent of damages for which liability is to be limited; persons protected by the limitation provisions; calculation of limits; wilful misconduct and gross negligence—their effect on limitation of liability; special cases of unlimited liability; and distribution of limit in case of plurality of claimants. The nature of the work precludes any "general conclusions." Strangely, the author seems not to realize that his thorough discussion of the grounds for limitation of liability is bound to raise serious doubts that such limitation is socially justified.

One notes with interest the pervasive nature of linguistic difficulties in the drafting and interpretation of the conventions. Contrary to a widespread belief, the use of only one language as the authentic text, as in the case of the Warsaw Convention, does not appear to be an effective remedy. The absence of an authentic text in another language may, indeed, complicate rather than simplify matters, as in the case of the divergent British and American translations of the Warsaw Convention used by the courts. Also noteworthy, in view of the currently fashionable depreciation of the value of preparatory work in the interpretation of treaties, is Mr. Drion's frequent and unhesitating resort to the minutes of the conferences to elucidate the meaning of the conventions.

The book is well edited and provided with excellent tables of cases and an index.

OLIVER J. LISSITZYN

The Study of International Relations. By Quincy Wright. New York: Appleton-Century-Crofts, 1955. pp. xii, 642. Appendix. Index. \$6.75.

✓ *Contemporary International Law: A Balance Sheet.* By Quincy Wright. Garden City, N. Y.: Doubleday and Co., 1955. pp. x, 66. \$0.95.

The President of the American Society of International Law has published two books almost simultaneously. One of these is a textbook in which the author continues an analysis of the disciplines set forth in his monumental *Study of War* of 1942. The other is a revised version of lectures delivered by him in March, 1949, before the Turkish Institute of International Law at Istanbul and Ankara.

The disciplines analyzed by Professor Wright in detail include international law. A discipline, according to Webster, is, among other things, a branch of knowledge or a course of study. It implies, according to Professor Wright,

consciousness by writers that there is a subject with some sort of unity; a concept of the scope of the subject and of the boundaries which separate it from other subjects; a certain consensus on its subdivisions, its organization and its methods; and some recognition of the persons who are expert on the subject and of the criteria for establishing such expertness. (p. 23.)

International relations, only recently recognized as a discipline, is studied by the author in the light of older disciplines, characterized as root disciplines, which have contributed to its development. International law is discussed both as a root discipline (p. 33) and as a practical discipline (pp. 216-236). A chapter is devoted to each of the ten practical disciplines (international politics, the art of war, the art of diplomacy, the conduct of foreign relations, colonial government, international organization, international law, international economics, international communication, and international education), and to each of the theoretical disciplines (political geography, political demography, technology, the sociology of international relations, the psychology of international relations, and international ethics).

Busy readers of this JOURNAL may be obliged to deny themselves the pleasure of following Professor Wright in his fascinating excursions into the theoretical disciplines and even into the root and practical disciplines other than international law. They will be well repaid, however, for the time they spend in the study of his chapter on international law. The following excerpts from that chapter (pp. 228-230) will indicate its quality:

The old international law assumed that states are the only subjects of international law, that they enjoy sovereignty and independence except in so far as modified by explicit rules of customary or conventional international law, that they are free to initiate war for *reason of state*, and that nonparticipating states are obliged to observe impartial neutrality. . . .

The new international law assumes that individuals and international organizations, as well as states, are subjects of international law; that the sovereignty and independence of states is limited by rules of international law and procedure intended to realize the purposes and maintain the principles of the United Nations Charter; that the initiation of aggressive war is an unlawful act and does not protect the responsible individuals from criminal prosecution even if committed in the name of a state, and that non-participating states must not help the aggressor and must assist the United Nations in maintaining and restoring international peace and security. . . .

Juristic opinion is divided as between advocates of the old and the new international law. It is urged on the one hand that the political and social conditions of the world will not in any foreseeable future permit realization of the new international law; that assertion of a law incapable of realization, produces disillusionment, contempt for law, and retrogression to chaos; that the new international law im-

plies a centralization of world authority favorable to administrative tyranny and dangerous to human liberty; and that, in any case, such centralization presupposes a uniformity of world civilization which would eliminate the competition of value systems essential for human progress. . . .

The advocates of the new international law, on the other hand, urge that the old international law . . . is not adapted to the shrinking world in which all peoples are vulnerable to military, economic, and propaganda attacks from distant quarters and that civilization or even the human race itself will be destroyed unless the world organizes effectively to maintain the principles of the new international law. . . .

The new international law, it is insisted, need not involve a degree of legal or political centralization or cultural uniformity incompatible with human progress, in fact the social and cultural differences among nations and regions are so embedded in geographic, climatic, economic, and historic conditions that fear of too much uniformity in the world is fantastic. Concerted effort on the political, economic, educational, and cultural fronts can, it is said, create conditions under which the new international law can be realized. It is, therefore, asserted that the old international law has become obsolete and undesirable beyond hope of revival, and that the peoples and governments must strive to realize the new international law to which they have committed themselves.

The slenderer of the books under review is issued as one of the Double-day short studies in political science. In the author's words (p. 4), it "emphasizes the dynamic character of international law and deals particularly with the influence of international organization and international politics in effecting important but imperfectly implemented changes in international law during the twentieth century." International law, the author acknowledges (p. 51), "remains subordinate to international politics," and "the conditions of the world bear little resemblance to the expectations set forth in legal documents" (p. 52). "National states," he observes, "rest on complex equilibria of power." "The balance of power in world politics," on the other hand, "has been characterized by its simplicity" (p. 59). The best hope for the peaceful development of a law-governed world lies, in the author's opinion, in the possibility that this balance may be made more complicated.

EDGAR TURLINGTON

Laws Concerning Nationality. United Nations Doc. No. ST/LEG/SER.B/4; Sales No. 1954.V.1. New York: The United Nations, 1954. pp. xvii, 594. \$4.00.

This volume is of importance to almost all practical workers in the international legal field. It gives in English version (except for French versions of laws originally in French) the texts of current nationality legislation of 84 nations, including all Members of the United Nations except Byelorussia, Ukraine, and Yemen. It also contains the Hague Convention and Protocols of 1930 and other multilateral treaties on nationality.

A great proportion of the international law problems which come before foreign offices or which are dealt with by practicing lawyers involve matters

of nationality at least incidentally. As the 1929 collection by Flournoy and Hudson¹ began to go out of date, the need for such a volume as the present has increased, but there has been no ready collection of the texts of nationality laws available. 69 of the 84 nations covered by this book have adopted new fundamental laws on nationality since 1929 (including the United States, for example), while yet others have amended their legislation in the last 26 years. The United Nations Secretariat has prepared and published this collection, pursuant to recommendation of the International Law Commission, both as a means to make the evidence of customary international law more readily available and to serve the needs of the International Law Commission in its own work of progressive development and codification of international law. The task has been well performed, and it will also serve a great need felt by lawyers, government officials, teachers and scholars who must work with the nationality laws of countries other than their own.

W. W. B.

La Doctrina del Reconocimiento en la Teoría y en la Práctica de los Estados.

By Gabriela Arevalo Blumenkron. Mexico, D.F.: Porrúa Hnos. y Cia., 1954. pp. 160. Appendix. Index. Bibliography.

This is a competent, comprehensive and readable review of the leading authorities and of state practice with respect to recognition of states and governments. The author adopts Professor Wright's view that recognition of states is in principle declarative but in practice constitutive (p. 44). She is disturbed by the fact that recognition of governments has sometimes been used as "an instrument of national policy of states" (p. 131). She approves the Estrada Doctrine, "an important contribution of Mexico" (p. 132), chiefly on the ground that in practice it would transform express recognition into tacit recognition (p. 131). The appendix (pp. 135-149) contains interesting notes on *Luther v. Sagor*, *Salimoff v. Standard Oil*, the *Tinoco* case and the *Arantzazu Mendi* case.

EDGAR TURLINGTON

European Yearbook. Vol. I. Published under the Auspices of the Council of Europe. The Hague: Martinus Nijhoff, 1955. pp. xxvi, 584. Index. Gld. 28.50.

The joint editors of this volume, Drs. B. Landheer and A. H. Robertson, have begun a most useful series for the Editorial Committee at Strasbourg. The text is French and English, all documents being in both languages, and the papers summarized in the other language. Ten papers fill a third of the space, six of them dealing with the work of the Council of Europe, the Organization for European Economic Co-operation, the European Coal and Steel Community and the European Convention on Human Rights, by their

¹ R. W. Flournoy and M. O. Hudson, *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* (1929); reviewed by H. B. Hazard, 25 A.J.I.L. 176 (1931).

officials. Elco van Kleffens examines unity and diversity in Europe, Robert Schuman, Europe's cultural and spiritual community and C. Wilfred Jenks, "World Organization and European Integration." Professor Basilio Cialdea of Rome hopefully analyzes the future prospects of the European Political Community which was sidetracked with the defeat of the European Defense Community.

This *Yearbook* promises to be a documentary bible for its subject. The eight chapters on institutions contain chronologies and structural and organizational accounts as well as texts and lists of publications. In addition there is a bibliography giving excerpts from books and titles of articles.

The extent of development will astonish many who use this volume. The Brussels Treaty Organization, now transformed into the Western European Union, ramifies socially and culturally as widely as the Organization for European Economic Co-operation does economically with its European Payments Union, European Productivity Agency, and its horizontal and vertical committees. The supra-national European Coal and Steel Community and the Council of Europe are the source and channel for further evolution. This first *Yearbook* only partially presents the picture of integration. It notices the Northern Council of the four Scandinavian states, the European Conference of Ministers of Transport, the European Organization for Nuclear Research and the European Conference on the Organization of Agricultural Markets. But the Civil Aviation Conference and at least a dozen important conventions concluded by the organizations noticed are held over for the second volume. It is evident that European integration is on the march and needs a yearbook to record its progress.

DENYS P. MYERS

Political Handbook of the World, 1955. Walter H. Mallory (editor). New York: Harper & Brothers, for Council on Foreign Relations, 1955. pp. 230. \$3.75.

The twenty-eighth annual edition of this standard work is even better than the jacket says it is. It was not only brought up to date as of January 1, 1955; it records, on page 151, significant political events that occurred on January 3 and 15, 1955. This reviewer would welcome amplification of the data presented on some of the nineteen countries which are brought together under the head of "Other Countries" on the last five pages of the book.

EDGAR TURLINGTON

The Political Economy of American Foreign Policy. Its Concepts, Strategy, and Limits. Report of a Study Group Sponsored by the Woodrow Wilson Foundation and the National Planning Association. New York: Henry Holt and Co., 1955. pp. xviii, 414. Index. \$6.00.

This is a thought-provoking volume dealing with one compartment of our foreign policy—American foreign economic policy in its contemporary setting. In the first and excellent chapter the Study Group distinguishes

between 19th-century world economy and 20th-century international economy. The former achieved and maintained a combination of economic freedom, calculability, and mutual adaptability of national economic structures and monetary systems; the latter is seeking to achieve a greater degree of international economic integration and to improve the economic health of the Western nations. The central objective of American foreign economic policy, so the Study Group concludes, should be the fostering of a better integrated and more effectively functioning international economic system in the age of total foreign policy.

The volume contains two parts entitled, respectively, *Diagnosis* and *Prescription*. Under the heading of *Diagnosis* the Study Group has attempted to present a "reasonably comprehensive picture, seen in a new perspective, of the chief disorders of the contemporary international economy and of its component national economies" such as those of Western Europe, Japan, the United States, and the underdeveloped countries. Under *Prescription* the group presents an analysis of postwar American foreign economic policy in theory and practice, the rôle of the United States and the administration of American foreign economic policy. In addition ample attention is given to the economic organization of the Western Community, including the Commonwealth, and the independent underdeveloped nations. By way of prescription of steps to be taken to make relationships more satisfactory between the industrial countries and the independent underdeveloped nations, the authors endorse private capital investment in foreign lands, the International Finance Corporation—still to be established—and, possibly as an addition to it, an International Development Corporation, providing new sources of venture capital and opening up new opportunities for private investors. They approve of continued loans or grants by the United States Government to the underdeveloped areas and they recommend such devices as buffer-stock arrangements and certain commodity stabilization agreements.

In the concluding chapter the authors face the problem of whether Americans under the system of competitive private enterprise will attain the degree of national understanding needed and possess the energy and moral inspiration necessary to establish this relationship between the industrial nations and the underdeveloped areas. They point to a major obstacle to more effective American leadership: "American reluctance to exercise power to even the minimum degree necessary to create and support a tolerable political and economic order among the nations of the free world." They acknowledge the need for redefinition and renovation of the living values of our society, the need to express "creatively and relevantly a new concept of the American mission in the world."

The fact that most of the members of the Study Group have served in the executive or legislative branch of the United States Government makes the recommendations more meaningful; it will not make them acceptable to those Americans who cling to concepts of the 19th-century world economy.

The Political Economy of American Foreign Policy will appeal to the student of international relations and to the person who is seeking infor-

mation about the underdeveloped areas. Citizens of the United States would do well to read the book, especially chapters one, nine, ten and eleven. Within those four chapters alone there is plenty of food for thought.

MARY E. BRADSHAW

Promoting Economic Development. The United States and Southern Asia.

By Edward S. Mason. Foreword by Homer D. Crotty. Claremont, Calif.: Claremont College, 1955. pp. ii, 83. \$2.75.

Asia and Africa in the Modern World. Basic Information Concerning Independent Countries. Edited by S. L. Poplai. Bombay and Calcutta: Asia Publishing House; New York: Institute of Pacific Relations, 1955. pp. viii, 218. Tables. Appendices. \$1.25.

Aiding Underdeveloped Countries Through International Economic Cooperation. By G. Van Der Veen. Delft: Naamloze Vennootschap W. D. Meinema, 1954. pp. 200. \$2.50.

Dean Mason of the Harvard Graduate School of Public Administration served the Government of Pakistan in 1954 as a consultant to the National Planning Board. On his return he delivered the Claremont Lectures before a general audience of business and professional leaders, which are reproduced in this volume, together with a more technical chapter on "Pakistan, a Case Study." The author is convinced that the Communist threat in Asia is

a two-pronged threat . . . of external military aggression and . . . of internal revolution. To attempt to meet the second more effectively does not mean that we can neglect the first. . . . I strongly believe, on security grounds, that a sizeable economic assistance program for southern Asia is in the interests of the United States. But I do not believe that results can be guaranteed. (pp. 2-3.)

Dean Mason's reasoning is calm and buttressed by strong economic arguments. He does not play down the inherent difficulties in the situation, including tradition and inertia, shortage of organizing and administrative capacity, rapid population increases, and the preponderance of traders, money-lenders, and real estate speculators among the native entrepreneurs. United States economic assistance to the countries of southern Asia is "nevertheless, a risk that seems to me worth taking" (p. 54).

Mr. S. L. Poplai of the Staff of the Indian Council of World Affairs has edited a convenient handbook on the Asian and African countries which were represented at the Bandung Conference (omitting the Union of South Africa, South and North Korea, Formosa and Israel). It contains brief but instructive geographic and historical notes, and information on the "Constitutional Framework," "Foreign Relations" and "Economic Resources" of these countries. The presentation is factual and generally objective. An introductory chapter on the "Genesis of the Asian-African Conference" and an Appendix of pertinent documents are very helpful. The population statistics given in the text, however, are not identical with those listed in the Appendix, except in a few instances; in the case of Liberia the difference is one hundred percent (pp. 31, 216).

Dr. Van Der Veen's dissertation at the University of Amsterdam lists and discusses briefly a wide variety of facts and developments relating to the economic situation of underdeveloped countries and to national and international efforts related to their improvement, from the fifteenth century on. The author deals with his subject from the points of view of law, economics, international organization, and religion, and therefore provides *multa* rather than *multum* for the reader who, however, is grateful here and there for an interesting new fact or angle. The documentation is careful and extensive, but ends with 1951.

JOHN BROWN MASON

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EUROPA ARCHIV, June 5/20, 1955 (Vol. 10, Nos. 11-12). *Europa 1955—Elemente einer Zwischenbilanz* (p. 7885); *Die internationale Lage vor neuen Viermächte-Verhandlungen* (pp. 7886-7890), B. H. M. Vlekke; *Der europäische Sicherheitspakt—ein Schritt zur Entspannung im Ost-West-Konflikt und zur Wiedervereinigung Deutschlands* (pp. 7891-7906), Eberhard Menzel; *Die Neutralität der Schweiz und der Europarat* (pp. 7907-7912), Max Petitpierre; *Neubeginn und Kontinuität der Europapolitik seit 1945* (pp. 7913-7920), Wilhelm Cornides.

—, July 5, 1955 (Vol. 10, No. 13). *Die Eingliederung der Streitkräfte in das Staatswesen der Bundesrepublik* (pp. 7953-7958), Arnold Bergsträsser and Theodor Eschenburg; *Staatliche Exportförderung—Symptom unserer Zeit* (pp. 7959-7966), Hannedore Kahmann and Lutz Köllner.

—, July 20, 1955 (Vol. 10, No. 14). *Regionale Sicherheitsbestrebungen im Mittleren Osten* (pp. 7985-8007), Fritz Steppat.

—, August 5, 1955 (Vol. 10, No. 15). *Die Stellung Indiens in der Weltpolitik. Eine Uebersicht über die indische Aussenpolitik 1947-1955* (pp. 8031-8036), K. P. Karunakaran; *Internationale Folgeerscheinungen der wirtschaftlichen, sozialen und politischen Umwandlung in Asien* (pp. 8038-8044), Ormond Wilson; *Der "Kolonialismus" in Südostasien* (pp. 8045-8052).

FOREIGN AFFAIRS, July, 1955 (Vol. 33, No. 4). *The Bad and the Good in Us* (pp. 535-547), Paul H. Douglas; *The Mind of Asia* (pp. 548-565), M. R. Masani; *The Future of our Professional Diplomacy* (pp. 566-586), George F. Kennan; *Reflections on the Yalta Papers* (pp. 615-623), Raymond J. Sontag; *A Fresh Look at the Inter-American Community* (pp. 634-647), Edward G. Miller, Jr.; *Ottawa and Washington Look at the U.N.* (pp. 663-678), Kenneth McNaught.

FOREIGN SERVICE JOURNAL, August, 1955 (Vol. 32, No. 8). *Organization for the Conduct of Foreign Policy* (pp. 18-20, 46-48), Lincoln Gordon; *Executive Responsibilities in the Foreign Service* (pp. 21, 40, 48), James F. Grady; *Investment in Understanding* (pp. 26-29, 42), Henry B. Cox.

EL FORO (Mexico), January-March, 1955 (Vol. 4, No. 7). *Cuestiones Jurisdiccionales Involucradas en la Revolucion Guatemalteca* (pp. 17-23), C. G. Fenwick; *El Concepto de Derecho Subjetivo* (pp. 41-70), Oscar Morineau.

FREE CHINA REVIEW, May, 1955 (Vol. 5, No. 5). *Forgotten Men: Detained U. S. Flyers* (pp. 2-3); *We Want No Allied Guarantee* (pp. 4-5); *Understanding Asia* (pp. 6-10), Hu Shih; *The Fight for Asian Freedom* (pp. 11-13), Durham S. F. Chen; *"Two Chinas" or One?* (pp. 13-15), Geraldine Fitch; *The Chinese People and Christian Democracy* (pp. 15-18), Paul K. T. Sih; *Reorganization of the UN Secretariat* (pp. 18-21), Fu Yun-ying.

—, June, 1955 (Vol. 5, No. 6). *The Nationality of Overseas Chinese* (p. 2); *Restoration of German Sovereignty* (p. 3); *Natural Law and Democracy in Chinese Philosophy* (pp. 7-14), John C. H. Wu; *What is Necessary to Make Democracy Work in Japan* (pp. 15-18), Kotaro Tanaka; *The Future of Democracy in Korea* (pp. 18-22), Ben C. Limb; *Philippine Democracy in Spirit and Practice* (pp. 22-25), Modesto Farolan; *Democratic Development in Vietnam* (pp. 25-36), Ngo Dinh Diem.

GEOGRAPHICAL REVIEW, July, 1955 (Vol. 45, No. 3). *Views of the Political World* (pp. 309-326), Stephen B. Jones; *The Economic Geography of Neutral Territories* (pp. 359-374), Alexander Melamid.

GEORGETOWN LAW JOURNAL, June, 1955 (Vol. 43, No. 4). *Aspects of Settling Claims under the Yugoslav Claims Agreement of 1948* (pp. 582-614), Henry J. Clay; *Enforcement of United States Antitrust Laws over Alien Corporations* (pp. 661-670), Werner J. Kronstein.

HARVARD LAW REVIEW, June, 1955 (Vol. 68, No. 8). *The Flag, The Constitution, and International Agreements* (pp. 1374-1381), Arthur E. Sutherland, Jr.; *Government Exclusion of Foreign Political Propaganda* (pp. 1393-1409).

HUNGARIAN REVIEW, February, 1955 (No. 2). *Hungary at the General Conference of UNESCO in Montevideo* (pp. 5-6), Aladár Tamás.

—, June, 1955 (No. 6). *Hungarian National Assembly Ratifies Warsaw Treaty* (pp. 1-3).

INFORMACION JURÍDICA (Madrid), May-June, 1955 (Nos. 144-145). *Nota sobre los Principales Sistemas Nacionales de la Ciencia Política Contemporánea* (pp. 297-313), Manuel Fraga Iribarne; *El Tribunal del Santo Oficio en Nueva España* (pp. 315-320), Rebeca Sobrino-Leal.

INTERNATIONAL LABOUR REVIEW, April, 1955 (Vol. 71, No. 4). *The First European Regional Conference* (pp. 325-346); *Freedom of Association and Industrial Relations in Asian Countries* (pp. 364-393), E. Daya.

—, May, 1955 (Vol. 71, No. 5). *Freedom of Association and Industrial Relations in Asian Countries* (pp. 467-497), E. Daya; *The Colombo Plan* (pp. 498-515).

INTER-PARLIAMENTARY BULLETIN, 1955 (Vol. 35, No. 2). *The Road to Peace* (pp. 49-53), Bertrand Russell.

JOURNAL DU DROIT INTERNATIONAL (CLUNET), January-March, 1955 (Vol. 82, No. 1). *Du Domaine d'application des Lois de nationalité en droit français* (pp. 4-45), R. Lehmann; *La Juridiction nationale et les saisies prononcées par des juges étrangers dans le cadre du traité de Montevideo* (pp. 47-75), Eduardo Couture; *La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de Justice* (pp. 76-106), Claude Rossillion; *L'existence du mariage contracté à l'étranger en violation du droit Argentin* (pp. 108-116), Jean Lisbonne.

—, April-June, 1955 (Vol. 82, No. 2). *Le droit international et la coexistence* (pp. 306-322), Roger Pinto; *Du Domaine d'application des Lois de nationalité en droit français* (pp. 324-382), R. Lehmann; *Le nouveau régime fiscal français de l'instance en exequatur des jugements étrangers* (pp. 384-388), Jacques Guilhot.

NEW TIMES, May 28, 1955 (No. 22). *The Warsaw Treaty and World Security* (pp. 1-3); *International Confidence* (pp. 3-5), Observer; *Atomic Energy—Two Policies* (pp. 6-11), V. Yemelyanov; *Soviet-Indian Economic Cooperation* (pp. 12-13), V. Spandaryan; *Swiss Neutrality* (pp. 28-30), V. Durdenevsky.

—, July 14, 1955 (No. 29). *The Realistic Road to a Détente* (pp. 2-5), O. Bogdanov; *U. S. War Bases in Japan* (pp. 17-19), G. Zhuikov.

NEWS, July 1, 1955 (No. 13). *Co-existence and Economic Rivalry* (pp. 5-6), Stanislav Strumilin; *Not the Root of the Evil* (pp. 9-10), Lydia Mojoryan; *U. S. War Bases and European National Interests* (pp. 14-15, 20), Fyodor Isacov.

—, July 16, 1955 (No. 14). *What the Peoples Expect from Geneva* (pp. 1-2); *At the World Assembly for Peace* (pp. 4-6), Nikolai Kovalsky; *Non-Involvement in War Blocs, and European Security* (pp. 7-9), Albert Manfred; *UNO: China's Lawful Rights* (pp. 9-10), Vladimir Kudryavtsev.

NORDISK TIDSSKRIFT FOR INTERNATIONAL RET OG JUS GENTIUM, 1955 (Vol. 25, Nos. 1-2). *Nogle Træk af Tidsskriftets Historie* (pp. XIV-XXII), Erik Brüel; *Rettens Plads i det mellemfolkelige Samkvem* (pp. 3-10), Eelco N. van Kleffens; *Den kollektiva säkerhetens filosofi* (pp. 11-25), Østen Undén; *Krig i atomalderen* (pp. 26-41), Ole Torleif Røed; *Norske dommer* (pp. 42-59), Edvard Hambro.

UNIVERSITY OF PENNSYLVANIA LAW REVIEW, May, 1955 (Vol. 103, No. 7). *The Role of International Law in a Metropolitan Practice* (pp. 886-900), Arthur H. Dean; *Supreme Court Permits Counterclaim against Sovereign Not Growing Out of Same Transaction* (pp. 980-983).

POLÍTICA INTERNACIONAL, January-March, 1955 (No. 21). *Las explosiones atómicas y las relaciones internacionales* (pp. 9-23), José Manuel Aniel-Quiroga; *Proyecto de una Unión Iberoamericana de Pagos* (pp. 25-41), Jesús Prados Arrarte; *Tiene América un Sistema de dos Partidos?* (pp. 43-59), Robert G. Neumann; *La Conferencia de Bangkok —El Neutralismo Asiático y los Países Amparados* (pp. 61-71), Carmen Martín de la Escalera; *La Política Internacional en el primer Trimestre de 1955* (pp. 75-85), Fernando Murillo Rubiera.

PRONTUARIO JURÍDICO (Caracas), April-June, 1955 (Nos. 211-220). *Procedimientos Prácticos para la Sistematización Codificada en la Unificación del Derecho Privado de*

las Naciones (pp. 1-2), Pedro Manuel Arcaya and Lorenzo Herrera Mendoza; *Unificación del Derecho Privado*: (pp. 3-4), Enrique V. Galli; (pp. 5-6), Juan Thol.

REVISTA DE LA FACULTAD DE DERECHO DE MEXICO, October-December, 1954 (Vol. 4, No. 16). *Ensayo sobre la Teoría del Reenvío en Derecho Privado Internacional* (pp. 117-158), Quintín Alfonsín.

REVISTA DO SERVIÇO PÚBLICO (Rio de Janeiro), January, 1955 (Vol. 66, No. 1). *Espírito da Diplomacia* (pp. 71-74), Altamir de Moura; *Assistência Técnica Internacional* (pp. 97-109), Estanislau Fischlowitz.

REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES (A. SOTTILE), April-June, 1955 (Vol. 33, No. 2). *Les Résolutions de l'Assemblée Générale des Nations Unies et la Portée du Droit Conventionnel* (pp. 111-125), G. Piotrowski; *L'intervention d'humanité et la Déclaration Universelle des Droits de l'Homme* (pp. 126-133), Eugène Aroneanu; *The Meaning of Paragraph 7 of Article 2 of the Charter* (pp. 134-141), Alkis N. Papacostas.

REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE, June, 1955 (Vol. 35, No. 9). *La Protection pénale des Conventions internationales humanitaires* (pp. 739-788), J. Y. Dautricourt.

REVUE HELLÉNIQUE DE DROIT INTERNATIONAL, April-December, 1954 (Vol. 7, Nos. 2-4). *Evolution récente de la jurisprudence suisse relative aux conflits de lois en matière de contrats* (pp. 137-142), Roger Secrétan; *Le Droit International Privé Suisse* (pp. 143-163), Adolf F. Schnitzer; *Facteurs déterminant la Notion de Crime International* (pp. 164-174), Athos G. Tsoutsos; *Speculations round the Privileges and Immunities of the United Nations* (pp. 175-193), Solon Cleanthe Ivraakis; *Some Aspects of International Fisheries Control in United States-Canadian Relations* (pp. 194-213), R. St. J. Macdonald; *The Cyprus Question in the United Nations* (pp. 214-219), Savas Loizides; *Protection accordée par le décret 2687/1953 aux Investissements à longue échéance de Capitaux venant de l'Étranger* (pp. 219-239), C. E. Lambadarios; *Sur un avant-projet de Loi concernant les Droits du Traducteur* (pp. 239-242), T. Ioannou; *Convention Européenne des Droits de l'Homme* (pp. 242-245), M. Faber.

SUDETEN BULLETIN, July-August, 1955 (Vol. 3, Nos. 7-8). *Mid-European Federation, a Political Necessity* (pp. 1, 3-4), Rudolf Lodgman von Auen; *The Problem of Expelles and Refugees* (pp. 4-6), Werner G. Middelman.

UKRAINIAN REVIEW, June, 1955 (Vol. 2, No. 2). *Bolshevist "Third Rome"* (pp. 3-7), I. Mirchuk; *The Theses of the Treaty of Pereyaslav* (pp. 41-45), Clarence A. Manning; *1654: The Pereyaslav Treaty in the Light of Contemporary Evidence* (pp. 45-54), N. Polonska-Vasylenko.

UNITED NATIONS REVIEW, May, 1955 (Vol. 1, No. 11). *All-European Economic Co-operation* (pp. 6-9), Max Suetens; *Libya and the United Nations* (pp. 51-56), Thomas F. Power, Jr.

—, August, 1955 (Vol. 2, No. 2). *Ensuring Universality of Services in Telecommunications* (pp. 31-33), Marco Aurelio Andrada; *The Postal Union's Wide Field of Operations* (pp. 43-44), Fritz Hess; *Meteorology's Unique International Service* (pp. 62-63), Gustav Swoboda; *The Living Resources of the Sea* (pp. 76-80).

WORLD AFFAIRS INTERPRETER, July, 1955, (Vol. 26, No. 2). *Parliamentary Diplomacy—Debate vs. Negotiation* (pp. 121-138), Dean Rusk; *Some Unfinished Business for U.S.A.* (pp. 139-149), Rockwell D. Hunt; *Atomic Energy for War and Peace* (pp. 172-185), Alvin C. Graves; *A Lesson of the Anglo-Iranian Oil Relations* (pp. 201-210), Rouhollah Karegar Ramazani.

ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, June, 1955 (Vol. 20, No. 2). *Internationales Zivilprozessrecht und internationales Privatrecht* (pp. 201-269), Paul Heinrich Neuhaus; *Das Londoner Schuldenabkommen. Rechtsfragen der zwischenstaatlichen Anwendung* (pp. 270-290), Günter Henn; *Die französische Gesetzgebung auf dem Gebiete des Privatrechts 1948-1953* (pp. 291-315), René Drouillat; *Niederländische Rechtsprechung zum internationalen Privat- und Prozessrecht. Veröffentlichungen der Jahre 1952-1954* (pp. 315-339), Georg Czapski.

INDEX TO VOLUME 49

[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *JD*, Judicial Decisions; *LA*, Leading Article]

- A. B., Case of, 6 Rev. Hellénique de Droit Int. 278. *Cited.* 423.
 Abandoned property on high seas. Case cited. 584.
 Abu Dhabi Award. *Cited.* 194, 197.
 Academy of International Law, The Hague. 26th session. *CN.* 248.
 Aechhione, Petition of, 213 F. 2d 845. *Cited.* 86.
 Acheson, Dean G., Secretary of State. Quoted on North Atlantic Treaty. 180.
 Adams v. Londeree, 83 S. E. 2d 127. *Cited.* 90.
 Aéroxon, Société Anonyme, v. Office des Séquestres, 141 Pasierisie Belge 1. *JD.* 259.
 Africa. Legal systems and international law. J. L. Kunz. *Ed.* 374.
 Agati v. Soc. Elettrica Coloniale Italiano, 9 Ann. di Dir. Int. 154. *JD.* 261.
 Aggression. Definition of, K. A. Baginyan quoted, 532; Stimson non-recognition doctrine, Q. Wright, *LA*, 324, 327; wars of, R. H. Jackson quoted, 46, 47, 48, 49.
 Ah Kong v. Dulles, 130 F. Supp. 546. *Cited.* 581.
 Ahmed Ubed, Sarris v., 9 Ann. di Dir. Int. 149. *Cited.* 268.
 Air France, Hennessy v., 17 Rev. Gén. de l'Air 80. *JD.* 95.
 Air law. A. D. McNair, *BR*, 111; Limitation of Liabilities in, H. Drion, *BR*, 594.
 Air transportation, international. American Smelting & Refining Co. v. Philippine Air Lines, N. Y. L. J., June 21, 1954, p. 6, *JD*, 93; Hennessy v. Compagnie Air France, 17 Rev. Gén. de l'Air 80, *JD*, 95; cases cited, 421, 583.
 Akata, Yaichiro, v. Brownell, 125 F. Supp. 6. *Cited.* 263.
 Alata v. Dulles, 221 F. 2d 52. *Cited.* 581.
 Albania, National Bank of. Arbitral opinion re Monetary Gold, Feb. 20, 1953, 10 Ann. Suisse de Droit Int. 11. *JD*, 403; case before I. C. J., C. T. Oliver, *Ed*, 216.
 Albert v. Brownell, 219 F. 2d 602. *Cited.* 419.
 Albrecht, Ralph G. Endowment of Manley O. Hudson Medal. *CN.* 389.
 Algemeene Kunstzijde Unie, N. V., v. U. S., 126 F. Supp. 916. *Cited.* 419.
 Aliens. Admission of, treaty-investor clauses in U. S. commercial treaties, R. R. Wilson, *Ed*, 366; exclusion of, U. S. v. Boyd, 222 F. 2d 445, *cited*, 579; expulsion of, cases cited, 585; non-resident, Iannone v. Radory Construction Corp., 141 N. Y. S. 2d 311, *JD*, 571, Viselli v. Martino, 140 N. Y. S. 2d 643, *cited*, 572; right to sue, Pilcher v. Dezso, 78 So. 2d 306, *cited*, 417; taxation of, Succession of Francisco Torrome, 82 Clunet 209, *cited*, 585.
 Allied Powers-Italy. Peace Treaty, 1947. Cases cited, 269, 417, 422, 423; Art. 15 on human rights, quoted, 241; Yugoslav obligations concerning human rights under, E. Schwelb, *CN*, 241.
 A. M. K. M. K. v. Chettiar, [1955] 2 W. L. R. 213. *Cited.* 419.
 Amarendra, Debendra v., All India Rep. 1955 Calcutta 159. *Cited.* 582.
 Amato, People v., N. Y. City Magistrate's Ct., Brooklyn, 1954. *JD.* 257.
 American Foreign Policy, The Political Economy of. *BR.* 599.
 American Institute Project, 1925. Quoted on tax exemption of diplomatic premises. 558.
 American Journal of International Law. Resignation of W. W. Bishop, Jr., as Editor-in-Chief. *CN.* 379.
 American Smelting and Refining Co. v. Philippine Air Lines, N. Y. L. J., June 21, 1954, p. 6. *JD.* 93.

- American Society of International Law. Annual award to Judge De Visscher, *CN*, 389; annual meeting, *CN*, 77, 239, 392; A. K. Kuhn a Patron of, *CN*, 77; Report of Committee to Study Legal Problems of the United Nations, H. Brandweiner quoted on, 533, 534.
- Anglo Chinese Shipping Company v. U. S., 127 F. Supp. 533. *JD*. 408.
- Anglo-Iranian Oil Co. Ltd. v. Società S. U. P. O. R., Civ. Trib. Rome, 1954. *JD*. 259.
- Anglo-Iranian Oil Dispute of 1951-1952. A. W. Ford. *BE*. 112.
- Anglo-Norwegian Fisheries Case. I. C. J. opinion. *LA*. 21.
- Annexation. Effect on identity of states. *Ed*. 74.
- Apollonio, In re, 128 F. Supp. 288. *Cited*. 418.
- Appeals from consular court decisions. *LA*. 514.
- Appleman, John Alan. Military Tribunals and International Crimes. *BE*. 114.
- Ara-Arroyos case, France, Cour de Cassation, 1953. *Cited*. 350, 353.
- Arab League Collective Security Pact. As collective defense arrangement. *LA*. 181.
- Arabia Saudita, Legazione, Soc. Vivai Industriali Roma v., 38 Riv. di Dir. Int. 80. *Cited*. 585.
- Arbitral procedure. Codification of rules. H. Lauterpacht. *LA*. 28, 30.
- Arbitration. Recueil des Arbitrages Internationaux, Vol. III. A. de La Pradelle. *BE*. 279.
- Arbitration Tribunal. Contractual Agreements with Germany. J. W. Bishop, Jr. *LA*. 141.
- Arethusa Film Soc. v. Reist, 37 Riv. di Dir. Int. 114. *JD*. 102.
- Armed attack. Regional self-defense against. Art. 51 of U. N. Charter quoted, 171; before San Francisco Conference on International Organization: G. Bebr, *LA*, 169; Australian and French proposals quoted, 171; report of Subcommittee III (4) A quoted, 172; U. S. Memorandum on Relations of Atomic Development Authority and U. N. Organs quoted, 174.
- Armed forces, foreign. Stationing in Germany, J. W. Bishop, Jr., *LA*, 129, 134; extra-territoriality, *LA*, 136.
- Asia. Legal systems and international law, J. L. Kunz, *Ed*, 374; and Africa in the Modern World, S. L. Poplai (ed.), *BE*, 601.
- Asquith, Lord. Quoted on continental shelf doctrine. 194.
- Atlantic City Radio Regulations, 1947. *Cited*. 384.
- Atlantic Refining Co., Ecker v., 125 F. Supp. 605. *Cited*. 263.
- Atomic weapons. German declaration at London, 1954, regarding. Quoted. 156.
- Attorneys' fees, int. claims commission. Jones v. Pearce, 277 S. W. 2d 934. *Cited*. 579.
- Augello v. Dulles. 122 F. Supp. 329, *cited*, 87; 220 F. 2d 344, *cited*, 581.
- Augustin, Cassa di Risparmio di Bolzano v., Foro Padano, 1951, p. 472. *Cited*. 263.
- Australia. Pearl Fisheries Act, 1952, *LA*, 187, 191; Proclamations of Sept. 10, 1953, concerning the continental shelf, *LA*, 185, 190; San Francisco proposal regarding regional arrangements, quoted, 171; sedentary fisheries and the continental shelf, D. P. O'Connell, *LA*, 185.
- Australia-Japan. Dispute over pearl fisheries. D. P. O'Connell. *LA*. 187, 194.
- Austria. Federal Constitution: Art. 9 on international law, *cited*, 452, 454, quoted 451; Art. 145 quoted, 475; provisions concerning treaties, *cited*, 455, 456, 457, 460, 461, 463, 467, 468, 470, 471, 473; judicial review of international agreements, *LA*, 472; permanent neutrality, *Ed*, 537; prewar treaties, Z. v. B., Foro Italiano, 1951, I, p. 486, *cited*, 270; relation of international law to internal law in, I. Seidl-Hohenveldern, *LA*, 451; State Treaty with, J. L. Kunz, *Ed*, 535; status of, cases cited, 583; treaty-making power in, L. Bittner cited, 457, I. Seidl-Hohenveldern, *LA*, 456.
- Austria-United States. Agreement concerning occupation costs and claims, 1947. *Cited*, 363; quoted, 561.
- Bachrack Bros, Murarka v., 215 F. 2d 547. *JD*. 254.
- Baggianini, Lagos Carmona v., 37 Riv. di Dir. Int. 114. *JD*. 102.
- Baghdasarian v. U. S., 220 F. 2d 677. *Cited*. 581.

- Baginyan, K. A. Quoted on definition of aggression. 532.
- Balkan Mutual Assistance Pact. *LA*. 182.
- Bank of America Nat. Trust and Savings Assn., *Brownell v.*, 214 F. 2d 855. *Cited*. 104.
- Bannout v. Brownell, 129 F. Supp. 488. *Cited*. 581.
- Bantel v. McGrath, 215 F. 2d 297. *Cited*. 579.
- Barandarian, Petition for Naturalization of, 123 F. Supp. 827. *Cited*. 264.
- Barnes, Application of, 219 F. 2d 137. *Cited*. 418.
- Bat Galim incident, Egypt-Israel. C. B. Selak, Jr. *LA*. 501.
- Batory, The, *Lambros Seaplane Base v.*, 215 F. 2d 228. *Cited*. 578.
- Baty, Thomas. International Law in Twilight. *BR*. 271.
- Bautista, *Brownell v.*, 10 Dec. L. J. 846. *Cited*. 266.
- Baxter, Richard R. The Geneva Conventions of 1949 before U. S. Senate. *CN*. 550.
- Bebr, Gerhard. Regional organizations, a United Nations problem. *LA*. 166.
- Bedo's Estate, In re, 136 N. Y. S. 2d 407. *Cited*. 580.
- Belgian State v. Wannijn, *Ned. Tijdschrift voor Int. Recht*, 1953-1954, p. 427. *Cited*. 267.
- Belgian State, Prof. Dr. E. M. J. C. H. v., *Ned. Tijdschrift voor Int. Recht*, 1953-1954, p. 208. *Cited*. 267.
- Belgium. Office des Séquestres, S. A. *Étab. Aéroxon v.*, 141 Pasierisie Belge 1. *JD*. 259.
- Belligerent occupation. J. W. Bishop, Jr., *LA*, 126; *Agati v. Soc. Elettrica Coloniale Italiano*, 9 Ann. di Dir. Int. 154, *JD*, 261; cases cited, 262, 263, 267, 368, 419, 423, 585.
- Beltran v. Brownell, 121 F. Supp. 835. *Cited*. 86.
- Bendayan, Case of, *Bull. des Arrêts, France, Ct. of Cassation*, 1954, p. 182. *Cited*. 267.
- Benoist, Jacques. Cited on treaties and municipal law in France. 349.
- Bering Sea Arbitration. *Cited*, 190, 204; quoted, 206.
- Berne Copyright Convention. *Cederna v. Cya*, 9 Ann. di Dir. Int. 192. *Cited*. 270.
- Bertoglio v. Federal German Republic, *Foro Padano*, 1951, p. 180. *Cited*. 262.
- Bevin, Ernest, Foreign Secretary. Quoted on North Atlantic Treaty. 180.
- Bial, Louis C. Some recent French decisions on the relationship between treaties and municipal law. *LA*. 347.
- Biddle v. United States, 156 Fed. 759 (1907). *Cited*. 511.
- Bie, Bingham and Company v., 133 N. Y. S. 2d 453. *Cited*. 263.
- Bills of lading, Hague Rules. *Pyrene Co. v. Scindia Navigation Co.*, [1954] 2 All Eng. L. R. 158. *Cited*. 104.
- Bindschedler, Rudolf L. *Rechtsfragen der Europäischen Einigung*. *BR*. 117.
- Bingham and Company v. Bie, 133 N. Y. S. 2d 453. *Cited*. 263.
- Bishop, Joseph W., Jr. The Contractual Agreements with the Federal Republic of Germany. *LA*. 125.
- Bishop, William W., Jr. Ford Foundation grants, *CN*, 252; Robert H. Jackson, *Ed*, 44; resignation as Editor-in-Chief of *AJIL*, *CN*, 379; Survey of Research in Progress on the Middle East, *CN*, 84; *BR*: Laws Concerning Nationality, 597.
- Bittner, Ludwig. Cited on treaty-making power in Austria. 457.
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AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 49

CONTENTS

1955

[No. 1, January, 1955, pp. 1-124; No. 2, April, 1955, pp. 125-294;
No. 3, July, 1955, pp. 295-450; No. 4, October, 1955, pp. 451-607]

	PAGE
THE THIRTY-THIRD YEAR OF THE WORLD COURT. <i>Manley O. Hudson</i>	1
CODIFICATION AND DEVELOPMENT OF INTERNATIONAL LAW. <i>H. Lauterpacht</i>	16
THE "CONTRACTUAL AGREEMENTS" WITH THE FEDERAL REPUBLIC OF GERMANY. <i>Joseph W. Bishop, Jr.</i>	125
THE FINAL ACT OF THE LONDON CONFERENCE ON GERMANY. <i>Herbert W. Briggs</i> ...	148
REGIONAL ORGANIZATIONS: A UNITED NATIONS PROBLEM. <i>Gerhard Bebr</i>	166
SEDENTARY FISHERIES AND THE AUSTRALIAN CONTINENTAL SHELF. <i>D. P. O'Connell</i>	185
THE UNITED NATIONS SECRETARIAT—SOME CONSTITUTIONAL AND ADMINISTRATIVE DEVELOPMENTS. <i>Maxwell Cohen</i>	295
THE CHINESE RECOGNITION PROBLEM. <i>Quincy Wright</i>	320
STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW. <i>F. V. García-Amador</i>	339
SOME RECENT FRENCH DECISIONS ON THE RELATIONSHIP BETWEEN TREATIES AND MUNICIPAL LAW. <i>Louis C. Bial</i>	347
RELATION OF INTERNATIONAL LAW TO INTERNAL LAW IN AUSTRIA. <i>Ignaz Seidl- Hohenveldern</i>	451
COMPENSATION FOR NATIONALIZED PROPERTY: BRITISH PRACTICE. <i>Alfred Drucker</i> .	477
THE SUEZ CANAL BASE AGREEMENT OF 1954. <i>Charles B. Selak, Jr.</i>	487
AMERICAN CONSULAR JURISDICTION IN MOROCCO AND THE TANGIER INTERNATIONAL JURISDICTION. <i>Kurt H. Nadelmann</i>	506
THE SOVIET INTERPRETATION OF INTERNATIONAL LAW. <i>W. W. Kulski</i>	518
EDITORIAL COMMENT:	
Robert H. Jackson. <i>William W. Bishop, Jr.</i>	44
Charles Warren. <i>Lester H. Woolsey</i>	50
Collective Security and the London Agreements. <i>C. G. Fenwick</i>	54
Enemy Property. <i>Philip C. Jessup</i>	57
Peace and War: Factual Continuum with Multiple Legal Consequences. <i>Myres S. McDougal</i>	63
Identity of States under International Law. <i>Josef L. Kunz</i>	68
The London and Paris Agreements on West Germany. <i>Josef L. Kunz</i>	210
The Monetary Gold Decision in Perspective. <i>Covey T. Oliver</i>	216
The International Law Commission's 1954 Report on the Regime of the Ter- ritorial Sea. <i>Philip C. Jessup</i>	221
Preparation for Review of the United Nations Charter. <i>Clyde Eagleton</i>	229
Membership and Representation in the United Nations. <i>Pitman B. Potter</i>	234
The Meeting of Consultation of Foreign Ministers as a Procedure of Inter- American Collective Security. <i>C. G. Fenwick</i>	235
The Hydrogen Bomb Tests and the International Law of the Sea. <i>Myres S. McDougal</i>	356

	PAGE
Executive Agreements and Emanations from the Fifth Amendment. <i>Covey T. Oliver</i>	362
"Treaty-Investor" Clauses in Commercial Treaties of the United States. <i>Robert R. Wilson</i>	366
Pluralism of Legal and Value Systems and International Law. <i>Josef L. Kunz</i> ..	370
The Realist Theory in Pyrrhic Victory. <i>Myres S. McDougal</i>	376
The State Treaty with Austria. <i>Josef L. Kunz</i>	535
End of the Cold War? <i>Pitman B. Potter</i>	542
The Treaty of 1955 between the United States and Panama. <i>C. G. Fenwick</i> ...	543
NOTES AND COMMENTS:	
Arthur K. Kuhn, a Patron of the Society. <i>E. H. F.</i>	77
49th Annual Meeting of the Society. <i>E. H. F.</i>	77
International Law Association. <i>Clyde Eagleton</i>	78
46th Session of the Institute of International Law. <i>Kaarel R. Pusta, Sr.</i>	80
Fourth International Congress of Comparative Law. <i>R. R. W.</i>	83
Survey of Research in Progress on the Middle East. <i>W. W. B.</i>	84
Prizes in International Organization. <i>E. H. F.</i>	85
Annual Meeting of the Society. <i>E. H. F.</i>	239
The Trieste Settlement and Human Rights. <i>Egon Schwelb</i>	240
Twenty-Sixth Session of the Hague Academy of International Law. <i>E. H. F.</i> ..	248
Meeting of Inter-American Bar Association Officers. <i>Wm. R. Vallance</i>	249
Ford Foundation Grants. <i>Wm. W. Bishop, Jr.</i>	252
Resignation of Editor-in-Chief of the <i>Journal</i>	379
Commission and Advisory Committee on International Rules of Judicial Procedure. <i>Harry LeRoy Jones</i>	379
Jamming and the Protection of Frequency Assignments. <i>George A. Coddington, Jr.</i>	384
International Bar Association. <i>Gerald J. McMahon</i>	388
Annual Award Conferred on Judge Charles De Visscher	389
The Manley O. Hudson Medal	389
Eighth Annual Summer Institute on International Law	390
Annual Meeting of the Society. <i>Eleanor H. Finch</i>	392
Albert De Geouffre de La Pradelle. <i>P. B. P.</i>	395
Frederic R. Coudert. <i>George A. Finch</i>	548
The Geneva Conventions of 1949 before the United States Senate. <i>E. R. Baxter</i> ..	550
Immunity from Taxation of Real Property Owned by Delegations to the United Nations. <i>Robert Delson</i>	555
Attempts to Transmute Indemnity into Discharge of Claims in Executive Agreements. <i>Michael H. Cardozo</i>	560
Organization of Central American States. Election of Secretary General. <i>C. G. Fenwick</i>	563
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW. <i>Oliver J. Lissitzyn</i>	86, 254, 396, 565
BOOK REVIEWS AND NOTES	105, 271, 426, 587
BOOKS RECEIVED	119, 287, 438, 602
PERIODICAL LITERATURE OF INTERNATIONAL LAW	121, 289, 440, 604
INDEX	608
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

OFFICIAL DOCUMENTS

CONTENTS

	PAGE
UNIVERSAL COPYRIGHT CONVENTION. <i>Geneva, September 6, 1952</i>	149
U.S.S.R., UNITED KINGDOM, UNITED STATES, FRANCE-AUSTRIA. State Treaty for the Re-Establishment of an Independent and Democratic Austria. <i>Vienna,</i> <i>May 15, 1955</i>	162
ALBANIA, BULGARIA, CZECHOSLOVAKIA, GERMAN DEMOCRATIC REPUBLIC, HUNGARY, POLAND, RUMANIA, U.S.S.R. Treaty of Friendship, Cooperation and Mutual Assistance. <i>Warsaw, May 14, 1955</i>	194
INDEX	200

UNIVERSAL COPYRIGHT CONVENTION

Signed at Geneva, September 6, 1952; in force September 16, 1955

The Contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have agreed as follows:

ARTICLE I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

ARTICLE II

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.

2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.

3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

ARTICLE III

1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Con-

¹ Sen. Exec. M, 83d Cong., 1st Sess. Ratifications of the convention have been deposited by the following states: Andorra, Chile, German Federal Republic, Haiti, Holy See, Israel, Luxembourg, Monaco, Spain, and the United States; accessions to the convention and annexed Protocols have been deposited by Cambodia, Costa Rica, Laos, Pakistan, and the Philippines.

vention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

2. The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

3. The provisions of paragraph 1 of this article shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the court or an administrative office, or both, a copy of the work involved in the litigation; provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed.

4. In each Contracting State there shall be legal means of protecting without formalities the unpublished works of nationals of other Contracting States.

5. If a Contracting State grants protection for more than one term of copyright and the first term is for a period longer than one of the minimum periods prescribed in Article IV, such State shall not be required to comply with the provisions of paragraph 1 of this Article III in respect of the second or any subsequent term of copyright.

ARTICLE IV

1. The duration of protection of a work shall be governed, in accordance with the provisions of Article II and this article, by the law of the Contracting State in which protection is claimed.

2. The term of protection for works protected under this Convention shall not be less than the life of the author and 25 years after his death.

However, any Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than 25 years from the date of first publication.

Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection

shall not be less than 25 years from the date of first publication or from its registration prior to publication, as the case may be.

If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall not be less than one of the minimum periods specified above.

3. The provisions of paragraph 2 of this article shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art insofar as they are protected as artistic works, shall not be less than ten years for each of said classes of works.

4. No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

For the purposes of the application of the preceding provision, if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term.

5. For the purposes of the application of paragraph 4 of this article, the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national.

6. For the purposes of the application of paragraph 4 of this article, in case of simultaneous publication in two or more Contracting States, the work shall be treated as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States.

ARTICLE V

1. Copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention.

2. However, any Contracting State may, by its domestic legislation, restrict the right of translation of writings, but only subject to the following provisions:

If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in the national language or languages, as the case may be, of the Contracting State, by the owner of the right of translation or with

his authorization, any national of such Contracting State may obtain a non-exclusive license from the competent authority thereof to translate the work and publish the work so translated in any of the national languages in which it has not been published; provided that such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A license may also be granted on the same conditions if all previous editions of a translation in such language are out of print.

If the owner of the right of translation cannot be found, then the applicant for a license shall send copies of his application to the publisher whose name appears on the work and, if the nationality of the owner of the right of translation is known, to the diplomatic or consular representative of the State of which such owner is a national, or to the organization which may have been designated by the government of that State. The license shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application.

Due provision shall be made by domestic legislation to assure to the owner of the right of translation a compensation which is just and conforms to international standards, to assure payment and transmittal of such compensation, and to assure a correct translation of the work.

The original title and the name of the author of the work shall be printed on all copies of the published translation. The license shall be valid only for publication of the translation in the territory of the Contracting State where it has been applied for. Copies so published may be imported and sold in another Contracting State if one of the national languages of such other State is the same language as that into which the work has been so translated, and if the domestic law in such other State makes provision for such licenses and does not prohibit such importation and sale. Where the foregoing conditions do not exist, the importation and sale of such copies in a Contracting State shall be governed by its domestic law and its agreements. The license shall not be transferred by the licensee.

The license shall not be granted when the author has withdrawn from circulation all copies of the work.

ARTICLE VI

"Publication," as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

ARTICLE VII

This Convention shall not apply to works or rights in works which, at the effective date of the Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State.

ARTICLE VIII

1. This Convention, which shall bear the date of September 6, 1952, shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization and shall remain open for signature by all States for a period of 120 days after that date. It shall be subject to ratification or acceptance by the signatory States.

2. Any State which has not signed this Convention may accede thereto.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

ARTICLE IX

1. This Convention shall come into force three months after the deposit of twelve instruments of ratification, acceptance or accession, among which there shall be those of four States which are not members of the International Union for the Protection of Literary and Artistic Works.

2. Subsequently, this Convention shall come into force in respect of each State three months after that State has deposited its instrument of ratification, acceptance or accession.

ARTICLE X

1. Each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood, however, that at the time an instrument of ratification, acceptance or accession is deposited on behalf of any State, such State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE XI

1. An Intergovernmental Committee is hereby established with the following duties:

(a) to study the problems concerning the application and operation of this Convention;

(b) to make preparation for periodic revisions of this Convention;

(c) to study any other problems concerning the international protection of copyright, in co-operation with the various interested international organizations, such as the United Nations Educational, Scientific and Cultural Organization, the International Union for the Protection of Literary and Artistic Works and the Organization of American States;

(d) to inform the Contracting States as to its activities.

2. The Committee shall consist of the representatives of twelve Contracting States to be selected with due consideration to fair geographical

representation and in conformity with the Resolution relating to this article, annexed to this Convention.

The Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works and the Secretary-General of the Organization of American States, or their representatives, may attend meetings of the Committee in an advisory capacity.

ARTICLE XII

The Intergovernmental Committee shall convene a conference for revision of this Convention whenever it deems necessary, or at the request of at least ten Contracting States, or of a majority of the Contracting States if there are less than twenty Contracting States.

ARTICLE XIII

Any Contracting State may, at the time of deposit of its instrument of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization that this Convention shall apply to all or any of the countries or territories for the international relations of which it is responsible and this Convention shall thereupon apply to the countries or territories named in such notification after the expiration of the term of three months provided for in Article IX. In the absence of such notification, this Convention shall not apply to any such country or territory.

ARTICLE XIV

1. Any Contracting State may denounce this Convention in its own name or on behalf of all or any of the countries or territories as to which a notification has been given under Article XIII. The denunciation shall be made by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization.

2. Such denunciation shall operate only in respect of the State or of the country or territory on whose behalf it was made and shall not take effect until twelve months after the date of receipt of the notification.

ARTICLE XV

A dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

ARTICLE XVI

1. This Convention shall be established in English, French and Spanish. The three texts shall be signed and shall be equally authoritative.

2. Official texts of this Convention shall be established in German, Italian and Portuguese.

Any Contracting State or group of Contracting States shall be entitled to have established by the Director-General of the United Nations Educational, Scientific and Cultural Organization other texts in the language of its choice by arrangement with the Director-General.

All such texts shall be annexed to the signed texts of this Convention.

ARTICLE XVII

1. This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.

2. In application of the foregoing paragraph, a Declaration has been annexed to the present article. This Declaration is an integral part of this Convention for the States bound by the Berne Convention on January 1, 1951, or which have or may become bound to it at a later date. The signature of this Convention by such States shall also constitute signature of the said Declaration, and ratification, acceptance or accession by such States shall include the Declaration as well as the Convention.

ARTICLE XVIII

This Convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date this Convention comes into force in such State shall not be affected.

ARTICLE XIX

This Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States. In the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date on which this Convention comes into force in such State shall not be affected. Nothing in this article shall affect the provisions of Articles XVII and XVIII of this Convention.

ARTICLE XX

Reservations to this Convention shall not be permitted.

ARTICLE XXI

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall send duly certified copies of this Convention to the States interested, to the Swiss Federal Council and to the Secretary-General of the United Nations for registration by him.

He shall also inform all interested States of the ratifications, acceptances and accessions which have been deposited, the date on which this Convention comes into force, the notifications under Article XIII of this Convention, and denunciations under Article XIV.

APPENDIX DECLARATION RELATING TO ARTICLE XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works, and which are signatories to the Universal Copyright Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the coexistence of the Convention of Berne and the Universal Convention,

Have, by common agreement, accepted the terms of the following declaration:

(a) Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after January 1, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;

(b) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.

RESOLUTION CONCERNING ARTICLE XI

The Intergovernmental Copyright Conference

Having considered the problems relating to the Intergovernmental Committee provided for in Article XI of the Universal Copyright Convention

resolves

1. The first members of the Committee shall be representatives of the following twelve States, each of those States designating one representative and an alternate: Argentine, Brazil, France, Germany, India, Italy, Japan, Mexico, Spain, Switzerland, United Kingdom, and United States of America.

2. The Committee shall be constituted as soon as the Convention comes into force in accordance with Article XI of this Convention;

3. The Committee shall elect its Chairman and one Vice-Chairman. It shall establish its rules of procedure having regard to the following principles:

(a) the normal duration of the term of office of the representatives shall be six years; with one-third retiring every two years;

(b) before the expiration of the term of office of any members, the Committee shall decide which States shall cease to be represented on it and which States shall be called upon to designate representatives; the representatives of those States which have not ratified, accepted or acceded shall be the first to retire;

(c) the different parts of the world shall be fairly represented;

and expresses the wish

that the United Nations Educational, Scientific, and Cultural Organization provide its Secretariat.

In faith whereof the undersigned, having deposited their respective full powers, have signed this Convention.

Done at Geneva, this sixth day of September, 1952 in a single copy.

For Afghanistan:	For the Bulgarian People's Republic:
For the People's Republic of Albania:	For the Kingdom of Cambodia:
For the German Federal Republic:	For Canada:
HOLZAPFEL	DR. VICTOR L. DORÉ
For Andorra:	C. STEIN
MARCEL PLAISANT	G. G. BECKETT
J. DE ERICE	For Ceylon:
M. DE LA CALZADA	For Chile:
PUGET	GALLIANO
For the Kingdom of Saudi-Arabia:	For China:
For the Argentine Republic:	For the Republic of Colombia:
E. MENDILAHARZU	For the Republic of Korea:
For the Federation of Australia:	For Costa Rica:
H. R. WILMOT	For Cuba:
ad ref.	J. J. REMOS
For Austria:	N. CHEDIAK
DR. KURT FRIEBERGER	HILDA LABRADA BERNAL
For Belgium:	For Denmark:
For the Byelorussian Soviet Socialist Republic:	TORBEN LUND
For the Union of Burma:	For the Dominican Republic:
For Bolivia:	For Egypt:
For Brazil:	For the Republic of El Salvador:
ILDEFONSO MASCARENHAS DA SILVA	H. ESCOBAR SERRANO
	AMY

- | | |
|---------------------------------------|---------------------------------|
| For Ecuador: | For the Kingdom of Laos: |
| For Spain: | For the Lebanon: |
| J. DE ERICE | For Liberia: |
| M. DE LA CALZADA | NAT. MASSAQUOI |
| For the United States of America: | J. ALB. JONES |
| LUTHER H. EVANS | For Libya: |
| For Ethiopia: | For Liechtenstein: |
| For Finland: | For Luxemburg: |
| Y. J. HAKULINEN | J. STURM |
| For France: | For Mexico: |
| MARCEL PLAISANT | G. FERNÁNDEZ DEL CASTILLO |
| PUGET | For Monaco: |
| J. ESCARRA | SOLAMITO |
| MARCEL BOUTET | C. BARREIRA |
| For Greece: | For Nepal: |
| For Guatemala: | For Nicaragua: |
| ad referendum | MULLHAUPT |
| ALB. DUPONT-WILLEMIN | For Norway: |
| For the Republic of Haiti: | EILIF MOE |
| A. ADDOR | For New Zealand: |
| For the Republic of Honduras: | For Pakistan: |
| BASILIO DE TELEPNEF | For Panama: |
| For the Hungarian People's Re- | For Paraguay: |
| public: | For the Netherlands: |
| For India: | G. H. C. BODENHAUSEN |
| B. N. LOKUR | For Peru: |
| For the Republic of Indonesia: | For the Republic of the Philip- |
| For Iran: | pines: |
| For Iraq: | For the Republic of Poland: |
| For Ireland: | For Portugal: |
| EDWARD A. CLEARY | JÚLIO DANTAS |
| PATRICK J. MCKENNA | JOSÉ GALHARDO |
| For Iceland: | For the Rumanian People's Re- |
| For the State of Israel: ² | public: |
| For Italy: | For the United Kingdom of Great |
| ANTONIO PENNETTA | Britain and Northern Ire- |
| FILIPPO PASQUERA | land: |
| For Japan: | J. L. BLAKE |
| For the Hashemite Kingdom of | |
| Jordan: | |

² Signed Dec. 16, 1952.

For the Republic of San Marino: <i>ad referendum:</i> DR. B. LIFSCHITZ	For Turkey: For the Ukrainian Soviet Socialist Republic:
For the Holy See: CH. COMTE J. PAUL BUENSOD	For the Union of South Africa: For the Union of Soviet Socialist Republics:
For Sweden: STURE PETRÉN ERIK HEDFELDT	For the Oriental Republic of Uruguay: JULIÁN NOGUEIRA IT EDUARDO PEROTTI
For the Confederation of Switzerland: PLINIO BOLLA HANS MORF HENRI THÉVENAZ	For the United States of Venezuela: For the State of Viet-Nam: For Yemen:
For the Republic of Syria: For Czechoslovakia: For Thailand:	For the Federal People's Republic of Yugoslavia: DR. BERTHOLD EISNER

Certified a true and complete copy of the original Universal Copyright Convention, signed at Geneva on 6 September 1952, and of a declaration annexed thereto relating to Article XVII thereof, and of a resolution concerning Article XI thereof, annexed thereto.

Paris, 3 November 1952.

HANNA SABA,
Legal Adviser
of the United Nations Educational,
Scientific and Cultural Organization.

PROTOCOL 1 ANNEXED TO THE UNIVERSAL COPYRIGHT CONVENTION CONCERNING THE APPLICATION OF THAT CONVENTION TO THE WORKS OF STATELESS PERSONS AND REFUGEES

The States parties hereto, being also parties to the Universal Copyright Convention (hereinafter referred to as the "Convention"), have accepted the following provisions:

1. Stateless persons and refugees who have their habitual residence in a State party to this Protocol shall, for the purposes of the Convention, be assimilated to the nationals of that State.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the Convention applied hereto.

(b) This Protocol shall enter into force in respect of each State, on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Geneva this sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of Unesco. The Director-General shall send certified copies to the signatory States, to the Swiss Federal Council and to the Secretary-General of the United Nations for registration.

[Here follows signatures on behalf of: German Federal Republic,¹ Andorra,¹ Argentina, Australia (*ad ref.*), Austria, Brazil, Canada, Cuba, Denmark, El Salvador, United States,¹ France, Guatemala (*ad ref.*), Haiti,¹ Honduras, India, Ireland,¹ Israel,¹ Italy, Liberia, Luxembourg,¹ Monaco,¹ Nicaragua, Norway, Portugal, United Kingdom, San Marino (*ad ref.*), the Holy See,¹ Sweden, Switzerland, Uruguay, Yugoslavia.]

PROTOCOL 2 ANNEXED TO THE UNIVERSAL COPYRIGHT CONVENTION, CONCERNING THE APPLICATION OF THAT CONVENTION TO THE WORKS OF CERTAIN INTERNATIONAL ORGANISATIONS

The States parties hereto, being also parties to the Universal Copyright Convention (hereinafter referred to as the "Convention"),

Have accepted the following provisions:

1. (a) The protection provided for in Article II (1) of the Convention shall apply to works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organisation of American States;

(b) Similarly, Article II (2) of the Convention shall apply to the said organisation or agencies.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the Convention applied hereto.

(b) This Protocol shall enter into force for each State on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Geneva, this sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of the Unesco.

The Director-General shall send certificated copies to the signatory States, to the Swiss Federal Council, and to the Secretary-General of the United Nations for registration.

[Here follow signatures on behalf of: German Federal Republic,¹ Andorra,¹ Argentina, Australia (*ad. ref.*), Austria, Brazil, Canada, Chile,¹

¹ Ratification deposited.

Cuba, Denmark, El Salvador, Spain,¹ United States,¹ Finland, France, Guatemala (*ad ref.*), Haiti,¹ Honduras, India, Ireland, Israel,¹ Italy, Liberia, Luxembourg,¹ Mexico, Monaco,¹ Nicaragua, Norway, Portugal, United Kingdom, San Marino (*ad ref.*), the Holy See,¹ Sweden, Switzerland, Uruguay, Yugoslavia.]

PROTOCOL 3 ANNEXED TO THE UNIVERSAL COPYRIGHT CONVENTION CONCERNING THE EFFECTIVE DATE OF INSTRUMENTS OF RATIFICATION OR ACCEPTANCE OF OR ACCESSION TO THAT CONVENTION

States parties hereto,

Recognizing that the application of the Universal Copyright Convention (hereinafter referred to as the "Convention") to States participating in all the international copyright systems already in force will contribute greatly to the value of the Convention;

Have agreed as follows:

1. Any State party hereto may, on depositing its instrument of ratification or acceptance of or accession to the Convention, notify the Director-General of the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as "Director-General") that that instrument shall not take effect for the purposes of Article IX of the Convention until any other State named in such notification shall have deposited its instrument.

2. The notification referred to in paragraph 1 above shall accompany the instrument to which it relates.

3. The Director-General shall inform all States signatory or which have then acceded to the Convention of any notifications received in accordance with this Protocol.

4. This Protocol shall bear the same date and shall remain open for signature for the same period as the Convention.

5. It shall be subject to ratification or acceptance by the signatory States. Any State which has not signed this Protocol may accede thereto.

6. (a) Ratification or acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General.

(b) This Protocol shall enter into force on the date of deposit of not less than four instruments of ratification or acceptance or accession. The Director-General shall inform all interested States of this date. Instruments deposited after such date shall take effect on the date of their deposit.

In faith whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Geneva, the sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be annexed to the original copy of the Convention. The Director-General shall send certified copies to the signatory States, to the Swiss Federal Council, and to the Secretary-General of the United Nations for registration.

¹ Ratification deposited.

[Here follow signatures on behalf of: German Federal Republic,¹ Andorra,¹ Australia (*ad ref.*), Austria, Brazil, Canada, Denmark, El Salvador, United States, Finland, France, Guatemala (*ad ref.*), Haiti,¹ Honduras, Ireland,¹ Israel,¹ Italy, Luxembourg,¹ Nicaragua, Norway, The Netherlands, Portugal, United Kingdom, San Marino (*ad ref.*), the Holy See,¹ Sweden, Uruguay, Yugoslavia.]

UNION OF SOVIET SOCIALIST REPUBLICS, UNITED KING-
DOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE
UNITED STATES OF AMERICA, FRANCE—AUSTRIA

STATE TREATY FOR THE RE-ESTABLISHMENT OF AN
INDEPENDENT AND DEMOCRATIC AUSTRIA

*Signed at Vienna, May 15, 1955; in force July 27, 1955*²

PREAMBLE

The Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and France, hereinafter referred to as "the Allied and Associated Powers," of the one part and Austria, of the other part:

Whereas on 13th March, 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich;

Whereas in the Moscow Declaration published on 1st November, 1943, the Governments of the Union of Soviet Socialist Republics, the United Kingdom and the United States of America declared that they regarded the annexation of Austria by Germany on 13th March, 1938, as null and void and affirmed their wish to see Austria re-established as a free and independent State, and the French Committee of National Liberation made a similar declaration on 16th November, 1943;

Whereas as a result of the Allied victory Austria was liberated from the domination of Hitlerite Germany;

Whereas the Allied and Associated Powers, and Austria, taking into account the importance of the efforts which the Austrian people themselves have made and will have to continue to make for the restoration and democratic reconstruction of their country, desire to conclude a treaty re-establishing Austria as a free, independent and democratic State, thus contributing to the restoration of peace in Europe;

Whereas the Allied and Associated Powers desire by means of the present Treaty to settle in accordance with the principles of justice all questions which are still outstanding in connection with the events referred to above, including the annexation of Austria by Hitlerite Germany and participation of Austria in the war as an integral part of Germany; and

¹ Ratification deposited.

² Sen. Exec. G, 84th Cong., 1st Sess.

Whereas the Allied and Associated Powers and Austria are desirous for these purposes of concluding the present Treaty to serve as the basis of friendly relations between them, thereby enabling the Allied and Associated Powers to support Austria's application for admission to the United Nations Organization;

Have therefore appointed the undersigned Plenipotentiaries who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

PART I—POLITICAL AND TERRITORIAL CLAUSES

ARTICLE 1—RE-ESTABLISHMENT OF AUSTRIA AS A FREE AND INDEPENDENT STATE

The Allied and Associated Powers recognize that Austria is re-established as a sovereign, independent and democratic State.

ARTICLE 2—MAINTENANCE OF AUSTRIA'S INDEPENDENCE

The Allied and Associated Powers declare that they will respect the independence and territorial integrity of Austria as established under the present Treaty.

ARTICLE 3—RECOGNITION BY GERMANY OF AUSTRIAN INDEPENDENCE

The Allied and Associated Powers will incorporate in the German Peace Treaty provisions for securing from Germany the recognition of Austria's sovereignty and independence and the renunciation by Germany of all territorial and political claims in respect of Austria and Austrian territory.

ARTICLE 4—PROHIBITION OF ANSCHLUSS

1. The Allied and Associated Powers declare that political or economic union between Austria and Germany is prohibited. Austria fully recognizes its responsibilities in this matter and shall not enter into political or economic union with Germany in any form whatsoever.

2. In order to prevent such union Austria shall not conclude any agreement with Germany, nor do any act, nor take any measures likely, directly or indirectly, to promote political or economic union with Germany, or to impair its territorial integrity or political or economic independence. Austria further undertakes to prevent within its territory any act likely, directly or indirectly, to promote such union and shall prevent the existence, resurgence and activities of any organizations having as their aim political or economic union with Germany, and pan-German propaganda in favor of union with Germany.

ARTICLE 5—FRONTIERS OF AUSTRIA

The frontiers of Austria shall be those existing on 1st January, 1938.

ARTICLE 6—HUMAN RIGHTS

1. Austria shall take all measures necessary to secure to all persons under Austrian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.

2. Austria further undertakes that the laws in force in Austria shall not, either in their content or in their application, discriminate or entail any discrimination between persons of Austrian nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter.

ARTICLE 7—RIGHTS OF THE SLOVENE AND CROAT MINORITIES

1. Austrian nationals of the Slovene and Croat minorities in Carinthia, Burgenland and Styria shall enjoy the same rights on equal terms as all other Austrian nationals, including the right to their own organizations, meetings and press in their own language.

2. They are entitled to elementary instruction in the Slovene or Croat language and to a proportional number of their own secondary schools; in this connection school curricula shall be reviewed and a section of the Inspectorate of Education shall be established for Slovene and Croat schools.

3. In the administrative and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be accepted as an official language in addition to German. In such districts topographical terminology and inscriptions shall be in the Slovene or Croat language as well as in German.

4. Austrian nationals of the Slovene and Croat minorities in Carinthia, Burgenland and Styria shall participate in the cultural, administrative and judicial systems in these territories on equal terms with other Austrian nationals.

5. The activity of organizations whose aim is to deprive the Croat or Slovene population of their minority character or rights shall be prohibited.

ARTICLE 8—DEMOCRATIC INSTITUTIONS

Austria shall have a democratic government based on elections by secret ballot and shall guarantee to all citizens free, equal and universal suffrage as well as the right to be elected to public office without discrimination as to race, sex, language, religion or political opinion.

ARTICLE 9—DISSOLUTION OF NAZI ORGANIZATIONS

1. Austria shall complete the measures, already begun by the enactment of appropriate legislation approved by the Allied Commission for Austria, to destroy the National Socialist Party and its affiliated and supervised

organizations, including political, military and para-military organizations, on Austrian territory. Austria shall also continue the efforts to eliminate from Austrian political, economic and cultural life all traces of Nazism, to ensure that the above-mentioned organizations are not revived in any form, and to prevent all Nazi and militarist activity and propaganda in Austria.

2. Austria undertakes to dissolve all Fascist-type organizations existing on its territory, political, military and para-military, and likewise any other organizations carrying on activities hostile to any United Nation or which intend to deprive the people of their democratic rights.

3. Austria undertakes not to permit, under threat of penal punishment which shall be immediately determined in accordance with procedures established by Austrian Law, the existence and the activity on Austrian territory of the above-mentioned organizations.

ARTICLE 10—SPECIAL CLAUSES ON LEGISLATION

1. Austria undertakes to maintain and continue to implement the principles contained in the laws and legal measures adopted by the Austrian Government and Parliament since 1st May, 1945, and approved by the Allied Commission for Austria, aimed at liquidation of the remnants of the Nazi regime and at the re-establishment of the democratic system, and to complete the legislative and administrative measures already taken or begun since 1st May, 1945, to codify and give effect to the principles set out in Articles 6, 8 and 9 of the present Treaty, and insofar as she has not yet done so to repeal or amend all legislative and administrative measures adopted between 5th March, 1933, and 30th April, 1945, which conflict with the principles set forth in Articles 6, 8 and 9.

2. Austria further undertakes to maintain the law of 3rd April, 1919, concerning the House of Hapsburg-Lorraine.

ARTICLE 11—RECOGNITION OF PEACE TREATIES

Austria undertakes to recognize the full force of the Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland and other agreements or arrangements which have been or will be reached by the Allied and Associated Powers in respect of Germany and Japan for the restoration of peace.

PART II—MILITARY AND AIR CLAUSES

ARTICLE 12—PROHIBITION OF SERVICE IN THE AUSTRIAN ARMED FORCES OF FORMER MEMBERS OF NAZI ORGANIZATIONS, AND CERTAIN OTHER CATEGORIES OF PERSONS

The following shall in no case be permitted to serve in the Austrian Armed Forces:

1. Persons not of Austrian nationality;
2. Austrian nationals who had been German nationals at any time before 13th March, 1938;

3. Austrian nationals who served in the rank of Colonel or in any higher rank in the German Armed Forces during the period from 13th March, 1938, to 8th May, 1945;

4. With the exception of any persons who shall have been exonerated by the appropriate body in accordance with Austrian law, Austrian nationals falling within any of the following categories:

(a) Persons who at any time belonged to the National Socialist Party ("N. S. D. A. P.") or the "S. S.," "S. A.," or "S. D." organizations; the Secret State Police ("Gestapo"); or the National Socialist Soldiers' Association ("N. S. Soldatenring"); or the National Socialist Officers' Association ("N. S. Offiziersvereinigung").

(b) Officers in the National Socialist Fliers' Corps ("N. S. F. K.") or the National Socialist Motor Corps ("N. S. K. K.") of rank not lower than "Untersturmfuehrer" or its equivalent;

(c) Functionaries in any supervised or affiliated organizations of the N. S. D. A. P. of rank not lower than that equivalent to "Ortsgruppenleiter";

(d) Authors of printed works or scenarios placed by the competent commissions set up by the Government of Austria in the category of prohibited works because of their Nazi character;

(e) Leaders of industrial, commercial and financial undertakings who according to the official and authenticated reports of existing industrial, commercial and financial associations, trade unions and party organizations are found by the competent commission to have co-operated actively in the achievement of the aims of the N. S. D. A. P. or of any of its affiliated organizations, supported the principles of National Socialism or financed or spread propaganda for National Socialist organizations or their activities, and by any of the foregoing to have damaged the interests of an independent and democratic Austria.

ARTICLE 13—PROHIBITION OF SPECIAL WEAPONS

1. Austria shall not possess, construct or experiment with—(a) Any atomic weapon, (b) any other major weapon adaptable now or in the future to mass destruction and defined as such by the appropriate organ of the United Nations, (c) any self-propelled or guided missile or torpedoes, or apparatus connected with their discharge or control, (d) sea mines, (e) torpedoes capable of being manned, (f) submarines or other submersible craft, (g) motor torpedo boats, (h) specialized types of assault craft, (i) guns with a range of more than 30 kilometers, (j) asphyxiating, vesicant or poisonous materials or biological substances in quantities greater than, or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes.

2. The Allied and Associated Powers reserve the right to add to this Article prohibitions of any weapons which may be evolved as a result of scientific development.

ARTICLE 14—DISPOSAL OF WAR MATERIEL OF ALLIED AND GERMAN ORIGIN

1. All war materiel of Allied origin in Austria shall be placed at the disposal of the Allied or Associated Power concerned according to the instructions given by that Power.

Austria shall renounce all rights to the above-mentioned war materiel.

2. Within one year from the coming into force of the present Treaty Austria shall render unusable for any military purpose or destroy:

all excess war materiel of German or other non-Allied origin;

in so far as they relate to modern war materiel, all German and Japanese drawings, including existing blueprints, prototypes, experimental models and plans;

all war materiel prohibited by Article 13 of the present Treaty; all specialized installations, including research and production equipment, prohibited by Article 13 which are not convertible for authorized research, development or construction.

3. Within six months from the coming into force of the present Treaty Austria shall provide the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France with a list of the war materiel and installations enumerated in paragraph 2.

4. Austria shall not manufacture any war materiel of German design.

Austria shall not acquire or possess, either publicly or privately, or by any other means, any war materiel of German manufacture, origin or design except that the Austrian Government may utilize, for the creation of the Austrian armed forces, restricted quantities of war materiel of German manufacture, origin or design remaining in Austria after the Second World War.

5. A definition and list of war materiel for the purposes of the present Treaty are contained in Annex I.

ARTICLE 15—PREVENTION OF GERMAN REARMAMENT

1. Austria shall co-operate fully with the Allied and Associated Powers in order to ensure that Germany is unable to take steps outside German territory towards rearmament.

2. Austria shall not employ or train in military or civil aviation or in the experimentation, design, production or maintenance of war materiel:

persons who are, or were at any time previous to 13th March, 1938, nationals of Germany;

or Austrian nationals precluded from serving in the Armed Forces under Article 12;

or persons who are not Austrian nationals.

ARTICLE 16—PROHIBITION RELATING TO CIVIL AIRCRAFT OF GERMAN AND JAPANESE DESIGN

Austria shall not acquire or manufacture civil aircraft which are of German or Japanese design or which embody major assemblies of German or Japanese manufacture or design.

ARTICLE 17—DURATION OF LIMITATIONS

Each of the military and air clauses of the present Treaty shall remain in force until modified in whole or in part by agreement between the Allied and Associated Powers and Austria or, after Austria becomes a member of the United Nations, by agreement between the Security Council and Austria.

ARTICLE 18—PRISONERS OF WAR

1. Austrians who are now prisoners of war shall be repatriated as soon as possible, in accordance with arrangements to be agreed upon by the individual Powers detaining them and Austria.

2. All costs, including maintenance costs, incurred in moving Austrians who are now prisoners of war from their respective assembly points, as chosen by the Government of the Allied or Associated Power concerned, to the point of their entry into Austrian territory, shall be borne by the Government of Austria.

ARTICLE 19—WAR GRAVES AND MEMORIALS

1. Austria undertakes to respect, preserve and maintain the graves on Austrian territory of the soldiers, prisoners of war and nationals forcibly brought to Austria of the Allied Powers as well as of the other United Nations which were at war with Germany, the memorials and emblems on these graves, and the memorials to the military glory of the armies which fought on Austrian territory against Hitlerite Germany.

2. The Government of Austria shall recognize any commission, delegation or other organization authorized by the State concerned to identify, list, maintain or regulate the graves and edifices referred to in paragraph 1; shall facilitate the work of such organizations; and shall conclude in respect of the above-mentioned graves and edifices such agreements as may prove necessary with the State concerned or with any commission or delegation or other organization authorized by it. It likewise agrees to render, in conformity with reasonable sanitary requirements, every facility for the disinterment and despatch to their own country of the remains buried in the said graves, whether at the request of the official organizations of the State concerned or at the request of the relatives of the persons interred.

PART III

ARTICLE 20—WITHDRAWAL OF ALLIED FORCES

1. The Agreement on the Machinery of Control in Austria of 28th June, 1946 shall terminate on the coming into force of the present Treaty.

2. On the coming into force of the present Treaty, the Inter-Allied Command established under paragraph 4 of the Agreement on Zones of Occupation in Austria and the Administration of the City of Vienna of 9th July, 1945, shall cease to exercise any functions with respect to the administration of the City of Vienna. The Agreement on Zones of Occupation of Austria shall terminate upon completion of the withdrawal

from Austria of the forces of the Allied and Associated Powers in accordance with paragraph 3 of the present Article.

3. The forces of the Allied and Associated Powers and members of the Allied Commission for Austria shall be withdrawn from Austria within ninety days from the coming into force of the present Treaty, and in so far as possible not later than 31st December, 1955.

4. The Government of Austria shall accord to the forces of the Allied and Associated Powers and the members of the Allied Commission for Austria pending their withdrawal from Austria the same rights, immunities and facilities as they enjoyed immediately before the coming into force of the present Treaty.

5. The Allied and Associated Powers undertake to return to the Government of Austria after the coming into force of the present Treaty and within the period specified in paragraph 3 of this Article:

(a) All currency which was made available free of cost to the Allied and Associated Powers for the purpose of the occupation and which remains unexpended at the time of completion of withdrawal of the Allied forces;

(b) All Austrian property requisitioned by Allied forces or the Allied Commission, and which is still in their possession. The obligations under this sub-paragraph shall be applied without prejudice to the provisions of Article 22 of the present Treaty.

PART IV—CLAIMS ARISING OUT OF THE WAR

ARTICLE 21—REPARATION

No reparation shall be exacted from Austria arising out of the existence of a state of war in Europe after 1st September, 1939.

ARTICLE 22—GERMAN ASSETS IN AUSTRIA

The Soviet Union, the United Kingdom, the United States of America and France have the right to dispose of all German assets in Austria in accordance with the Protocol of the Berlin Conference of 2nd August, 1945.

1. The Soviet Union shall receive for a period of validity of thirty years concessions to oil fields equivalent to 60% of the extraction of oil in Austria for 1947, as well as property rights to all buildings, constructions, equipment, and other property belonging to these oil fields, in accordance with list No. 1 and map No. 1 annexed to the Treaty.

2. The Soviet Union shall receive concessions to 60% of all exploration areas located in Eastern Austria that are German assets to which the Soviet Union is entitled in conformity with the Potsdam Agreement and which are in its possession at the present time, in accordance with list No. 2 and map No. 2 annexed to the Treaty.

The Soviet Union shall have the right to carry out explorations on the exploration areas mentioned in the present paragraph for 8 years and to subsequent extraction of oil for a period of 25 years beginning from the moment of the discovery of oil.

3. The Soviet Union shall receive oil refineries having a total annual production capacity of 420,000 tons of crude oil, in accordance with list No. 3.

4. The Soviet Union shall receive those undertakings concerned in the distribution of oil products which are at its disposal, in accordance with list No. 4.

5. The Soviet Union shall receive the assets of the Danube Shipping Company (D. D. S. G.), located in Hungary, Roumania and Bulgaria; and, likewise, in accordance with list No. 5, 100% of the assets of the Danube Shipping Company located in Eastern Austria.

6. The Soviet Union shall transfer to Austria property, rights and interests held or claimed as German assets, together with existing equipment, and shall also transfer war industrial enterprises, together with existing equipment, houses and similar immovable property, including plots of land, located in Austria and held or claimed as war booty with the exception of the assets mentioned in paragraphs 1, 2, 3, 4 and 5 of the present Article. Austria for its part undertakes to pay the Soviet Union 150,000,000 United States dollars in freely convertible currency within a period of 6 years.

The said sum will be paid by Austria to the Soviet Union in equal three-monthly installments of 6,250,000 United States dollars in freely convertible currency. The first payment will be made on the first day of the second month following the month of the entry into force of the present Treaty. Subsequent three-monthly payments will be made on the first day of the appropriate month. The last three-monthly payment will be made on the last day of the six-year period after the entry into force of this Treaty.

The basis for payments provided for in this Article will be the United States dollar at its gold parity on 1st September, 1949, that is, 35 dollars for 1 ounce of gold.

As security for the punctual payment of the above-mentioned sums due to the Soviet Union the Austrian National Bank shall issue to the State Bank of the U.S.S.R. within two weeks of the coming into force of the present Treaty promissory notes to the total sum of 150,000,000 United States dollars to become payable on the dates provided for in the present Article.

The promissory notes to be issued by Austria will be non-interest-bearing. The State Bank of the U.S.S.R. does not intend to discount these notes provided that the Austrian Government and the Austrian National Bank carry out their obligations punctually and exactly.

7. Legal Position of Assets:

(a) All former German assets which have become the property of the Soviet Union in accordance with paragraphs 1, 2, 3, 4 and 5 of the present Article shall, as the general rule, remain under Austrian jurisdiction and, in conformity with this, Austrian legislation shall apply to them.

(b) Where duties and charges, commercial and industrial rights and the levying of taxation are concerned, these assets shall be subject to conditions not less favorable than those which apply or will apply to undertakings belonging to Austria and its nationals and also to other states and persons who are accorded most-favored-nation treatment.

(c) All former German assets which have become the property of the Soviet Union shall not be subject to expropriation without the consent of the Soviet Union.

(d) Austria will not raise any difficulties in regard to the export of profits or other income (i.e. rents) in the form of output or of any freely convertible currency received.

(e) The rights, properties and interests transferred to the Soviet Union as well as the rights, properties and interests which the Soviet Union relinquishes to Austria shall be transferred without any charges or claims on the part of the Soviet Union or on the part of Austria. Under the words "charges and claims" is understood not only creditor claims arising out of the exercise of Allied control of these properties, rights and interests after 8th May, 1945, but also all other claims including claims in respect of taxes. The reciprocal waiver by the Soviet Union and Austria of charges and claims applies to all such charges and claims as exist on the date when Austria formalizes the rights of the Soviet Union to the former German assets transferred to it and on the date of the actual transfer to Austria of the assets relinquished by the Soviet Union.

8. The transfer to Austria of all properties, rights and interests provided for in paragraph 6 of the present Article, and also the formalizing by Austria of the rights of the Soviet Union to the former German assets to be transferred shall be effected within two months from the date of the entry into force of the present Treaty.

9. The Soviet Union shall likewise own the rights, property and interests in respect of all assets, wherever they may be situated in Eastern Austria, created by Soviet organizations or acquired by them by purchase after 8th May, 1945 for the operation of the properties enumerated in Lists 1, 2, 3, 4 and 5 below.

The provisions as set forth in sub-paragraphs a, b, c and d of paragraph 7 of the present Article shall correspondingly apply to these assets.

10. Disputes which may arise in connection with the application of the provisions of the present Article shall be settled by means of bilateral negotiations between the interested parties.

In the event of failure to reach agreement by bilateral negotiations between the Governments of the Soviet Union and of Austria within three months, disputes shall be referred for settlement to an Arbitration Commission consisting of one representative of the Soviet Union and one representative of Austria with the addition of a third member, a national of a third country, selected by mutual agreement between the two Governments.

11. The United Kingdom, the United States of America and France hereby transfer to Austria all property, rights and interests held or claimed by or on behalf of any of them in Austria as former German assets or war booty.

Property, rights and interests transferred to Austria under this paragraph shall pass free from any charges or claims on the part of the United Kingdom, the United States of America or France arising out of the exercise of their control of these properties, rights or interests after 8th May, 1945.

12. After fulfillment by Austria of all obligations stipulated in the provisions of the present Article or derived from such provisions, the claims of the Allied and Associated Powers with respect to former German assets in Austria, based on the Decision of the Berlin Conference of 2nd August, 1945, shall be considered as fully satisfied.

13. Austria undertakes that, except in the case of educational, cultural, charitable and religious property none of the properties, rights and interests transferred to it as former German assets shall be returned to ownership of German juridical persons or where the value of the property, rights and interests exceeds 260,000 schillings, to the ownership of German natural persons. Austria further undertakes not to pass to foreign ownership those rights and properties indicated in Lists 1 and 2 of this Article which will be transferred to Austria by the Soviet Union in accordance with the Austro-Soviet Memorandum of April 15, 1955.

14. The provisions of this Article shall be subject to the terms of Annex II of this Treaty.

LIST No. 1

OIL FIELDS IN EASTERN AUSTRIA ON WHICH CONCESSIONS SHALL BE GRANTED TO THE SOVIET UNION

Serial No.	Name of Oil Field	Name of Company
1.....	Mühlberg.....	Itag.
2.....	St. Ulrich-DEA.....	D. E. A.
3.....	St. Ulrich-Niederdonau.....	Niederdonau.
4.....	Gösting-Kreutzfeld-Pionier (50% of Production)...	E. P. G.

NOTE: A. All properties of the oil fields listed above shall be transferred to the Soviet Union, including all wells, both productive and non-productive, with all their surface and underground equipment, oil collecting networks, installations and equipment for drilling, compressor and pumping stations, mechanical workshops, gasoline installations, steam-generating plants, electric generating plants and sub-stations with transmission networks, pipe lines, water supply systems and water mains, electric networks, steam lines, gas mains, oilfield roads, approach roads, telephone lines, fire fighting equipment, motor vehicle and tractor parks, office

and living accommodation serving the fields, and other property connected with the exploitation of the oil fields listed above.

B. The right of ownership and leasehold rights to all the properties of the above-mentioned producing fields shall be transferred to the Soviet Union to the extent that any natural or juridical person who owned these fields, exploited them or participated in their exploitation, had rights in, title to, or interest in the said properties.

In cases where any property was held on lease, the periods of the leases, as provided for in the lease agreements, shall be calculated from the date of the entry into force of the present Treaty, and the lease agreements cannot be terminated without the consent of the Soviet Union.

LIST No. 2

CONCESSIONS TO OIL EXPLORATION AREAS IN EASTERN AUSTRIA TO BE TRANSFERRED TO THE SOVIET UNION

Serial No.	Name of Concession	Name of Company	Hectarage of the area to be ceded to the U. S. S. R.
1.....	Neusiedlersee.....	Elverat.....	122,480
2.....	Leithagebirge.....	Kohle Oel Union	52,700
3.....	Gross Enzersdorf (including the Aderklaa field).	Niederdonau.....	175,000
4.....	Hauskirchen (including the Alt Lichtenwarth field).	Itag.....	4,800
5.....	St. Ulrich.....	D. E. A.....	740
6.....	Schrattenberg.....	Kohle Oel Union	3,940
7.....	Grosskrut.....	Wintershal.....	8,000
8.....	Mistelbach.....	Preussag.....	6,400
9.....	Paasdorf (50% of the area).....	E. P. G.....	3,650
10.....	Steinberg.....	Steinberg Naphta	100
11.....	Hausbrunn.....	D. E. A.....	350
12.....	Drasenhofen (area on Austrian territory).	Kohle Oel Union	8,060
13.....	Ameis.....	Preussag.....	7,080
14.....	Siebenhirten.....	Elverat.....	5,000
15.....	Leis.....	Itag.....	14,800
16.....	Korneuburg.....	Ritz.....	30,000
17.....	Klosterneuburg (50% of the area).....	E. P. G.....	7,900
18.....	Oberlaa.....	Preussag.....	51,400
19.....	Enzersdorf.....	Deutag.....	25,800
20.....	Oedenburger Pforte.....	Kohle Oel Union	55,410
21.....	Tulin.....	Donau Oel.....	38,070
22.....	Kilb (50% of the area).....	E. P. G.....	18,220
23.....	Pullendorf.....	Kohle Oel Union	60,700
24.....	Nord Steiermark (50% of the area in the Soviet Zone).	E. P. G.....	55,650
25.....	Mittel Steiermark (area in the Soviet Zone)	Wintershal.....	9,840
26.....	Gösting (50% of the area).....	E. P. G.....	250
	Total—26 Concessions.....		766,340 ha.

NOTE: A. All the properties of the above-mentioned oil exploration areas shall be transferred to the Soviet Union.

B. The right of ownership and leasehold rights to all the properties of the above-mentioned oil exploration areas shall be transferred to the Soviet Union to the extent that any natural or juridical person who owned these oil exploration areas, exploited them or participated in their exploitation, had rights in, title to, or interest in the said properties.

In cases where any property was held on lease, the periods of the leases, as provided for in the lease agreements, shall be calculated from the date of the entry into force of the present Treaty, and the lease agreements cannot be terminated without the consent of the Soviet Union.

LIST No. 3

OIL REFINERIES IN EASTERN AUSTRIA THE PROPERTY RIGHTS TO WHICH ARE TO BE TRANSFERRED TO THE SOVIET UNION

Serial No.	Name of the refinery	Annual productive capacity in 1,000 tons of crude oil in 1947
1.....	Lobau.....	240.0
2.....	Nova.....	120.0
3.....	Korneuburg.....	60.0
4.....	Okeros (re-refining).....	
5.....	Oil Refinery "Moosbierbaum" excluding the equipment belonging to France and subject to restitution.	
	Total.....	420.0

NOTE: A. The properties of the refineries shall be transferred with all their equipment including technological installations, electric generating stations, steam generating plants, mechanical workshops, oil depot equipment and storage parks, loading ramps and river moorings, pipe lines including the pipe line Lobau-Zistersdorf, roads, approach roads, office and living quarters, fire fighting equipment, etc.

B. The right of ownership and leasehold rights to all the properties of the above-mentioned oil refineries shall be transferred to the Soviet Union to the extent that any natural or juridical person who owned these refineries, exploited them or participated in their exploitation, had rights in, title to, or interest in the said properties.

In cases where any property was held on lease, the periods of the leases, as provided for in the lease agreements, shall be calculated from the date of the entry into force of the present Treaty, and the lease agreements cannot be terminated without the consent of the Soviet Union.

LIST No. 4

UNDERTAKINGS IN EASTERN AUSTRIA ENGAGED IN THE DISTRIBUTION OF OIL PRODUCTS, THE PROPERTY RIGHTS TO WHICH ARE TO BE TRANSFERRED TO THE SOVIET UNION

Serial No.	Name of the Undertaking
1.	Deutsche Gasolin A. G.—distributing branch in Austria G. m. b. H.
2.	"A. G. der Kohlenwerkstoffverband Gruppe Benzin-Benzol-Verband-Bechum"—branch in Austria including the oil depot belonging to it at Praterspitz.
3.	"Nova" Mineral Oel Vertrieb Gesellschaft m. b. H.
4.	"Donau-Oel G. m. b. H."
5.	"Nitag" with the oil depot at Praterspitz.
6.	Firms engaged in gas distribution "Erdgas G. m. b. H.", "Ferngas A. G.", "Zaya Gas G. m. b. H.", "Reintal Gas G. m. b. H.", and "B. F. Methane G. m. b. H."
7.	Oil depots "Praterspitz Winter Hafen" and "Mauthausen".
8.	"Wirtschaftliche Forschungsgesellschaft m. b. H." (W. I. F. O.) Oil depot at Lobau and plots of land.
9.	Pipe line Lobau (Austria)—Raudnitza (Czechoslovakia) on the section from Lobau to the Czechoslovak frontier.

NOTE: A. The undertakings shall be transferred with all their property located in Eastern Austria, including oil depots, pipe lines, distributing pumps, filling and emptying ramps, river moorings, roads, approach roads, etc.

In addition, the property rights over the whole park of railway tank wagons now in the possession of Soviet organizations shall be transferred to the Soviet Union.

B. The right of ownership and leasehold rights to all the equipment of the above-mentioned undertakings situated in Eastern Austria and engaged in the distribution of oil products shall be transferred to the Soviet Union to the extent that any natural or juridical person who owned these undertakings, exploited them or participated in their exploitation, had rights in, title to, or interest in the said equipment.

In cases where any property was held on lease, the periods of the leases, as provided for in the lease agreements, shall be calculated from the date of the entry into force of the present Treaty, and the lease agreements cannot be terminated without the consent of the Soviet Union.

LIST No. 5

ASSETS OF THE D. D. S. G. IN EASTERN AUSTRIA TO BE TRANSFERRED TO THE SOVIET UNION

I. SHIPYARD IN THE TOWN OF KORNEUBURG

The property rights of the shipyard in the town of Korneuburg situated on the left bank of the Danube at Kilometer 1943 and occupying territory

on both sides of the old bed of the river Danube, with an aggregate area estimated at 220,770 square meters are to be transferred to the Soviet Union. The wharf area is equal to 61,300 square meters and the berth accommodation to 177 meters.

Furthermore, rights in the lease of the shipyard area of 2,946 square meters are to be transferred to the Soviet Union.

Property rights and other rights to all the equipment of the shipyard to the extent that the D. D. S. G. had rights, or title to or interest in the said equipment, including all plots of land, buildings, dockyards and slips, floating tackle, workshops, buildings and premises, power stations, and transformer sub-stations, railway sidings, transport equipment, technological and operational equipment, tools and inventory, communications and all communal welfare installations, dwelling houses and barracks, and also all other property belonging to the shipyard are to be transferred to the Soviet Union.

II. AREAS OF THE PORT OF THE CITY OF VIENNA

(a) FIRST AREA (NORDBAHNBUECKE)

1. Port area from point 1931, 347.35 kilometers along the course of the Danube to point 1931, 211.65 kilometers, including in it the "Donau-Sandwerkplatz" area, and from point 1931, 176.90 kilometers to point 1930, 439.35 kilometers along the course of the Danube, including in it the areas "Nordbahnbruecke" and "Zwischenbruecke," extending along the wharfside for a total distance of 873.2 meters and with an average width of about 70 meters.

(b) SECOND AREA (NORDBAHNLAENDE)

2. Port area from point 1929, 803.00 kilometers to point 1929, 618.00 kilometers along the course of the Danube, extending along the wharfside for a distance of 185.00 meters and with an average width of about 15 meters with the two adjacent railways and also the plot of the "Kommunal Baeder" area.

(c) THIRD AREA (PRATERKAI)

Port area from point 1928, 858.90 kilometers to point 1927, 695.30 kilometers along the course of the Danube, for a distance of 1163.60 meters and with an average width of about 70 meters.

(d) FOURTH AREA

Port area, bordering on point 1925, 664.7 kilometers, on the Danube on the area of the port used by the Hungarian Steamship Company, to point 1925, 529.30 kilometers on the area occupied by the railway (Kaibahnhof), extending along the wharfside for a total distance of 135.4 meters and with an average width of about 70 meters.

The four areas of the Port enumerated shall be transferred with all the

hydro-technical constructions, warehouses, magazines, sheds, river station, operational, service and dwelling houses, auxiliary buildings and constructions, mechanical and loading and unloading equipment and mechanisms, repair shops with equipment, transformer sub-stations and electrical equipment, communications, communal welfare installations, all road and transport installations and also all equipment and inventory.

III. PROPERTY AND PLANT OF THE AGENCIES, OF RIVER STATIONS AND STORES

Serial Number	Name	Serial Number	Name
	NIEDERRANNA		AGGSBACH-DORF
1.....	Agency and warehouse building.	18.....	Agency building.
	OBERMUEHL	19.....	Warehouse.
2.....	Agency and warehouse building.		SPITZ
3.....	Land plot 536 square meters.	20.....	Agency building.
	NEUHAUS	21.....	Warehouse.
4.....	Waiting room.	22.....	Land plot 1355 square meters.
	MAUTHAUSEN		WEISSENKIRCHEN
5.....	Agency building.	23.....	Office and waiting room.
	WALLSEE	24.....	Warehouse.
6.....	Agency building.	25.....	Land plot 516 square meters.
7.....	Warehouse.		DUERNSTEIN
	GREIN	26.....	Agency building.
8.....	Agency and warehouse building.		STEIN
	SARMINGSTEIN	27.....	Living premises.
9.....	Agency building.	28.....	Waiting room and warehouse building.
	YBBS	29.....	Land plot alongside house.
10.....	Agency building.		KREMS
	POECHLARN	30.....	Agency building.
11.....	Living premises.		HOLLENBURG
12.....	Agency building.	31.....	Waiting room.
13.....	Land plot 1598 square meters.		TULLN
	MELK	32.....	Agency building.
14.....	Warehouse (in the city).		GREIFENSTEIN
15.....	Waiting room and office.	33.....	Shed.
16.....	Warehouse.		KORNEUBURG
	SCHOENBUEHEL	34.....	Waiting room and booking office building.
17.....	Waiting room.		

(Continued on next page)

Serial Number	Name	Serial Number	Name
	HAINBURG		LANDING STAGES
35.....	Living premises.	40.....	Melkstrom.
36.....	Agency building.	41.....	Isperdorf.
37.....	Warehouse.	42.....	Marbach.
38.....	Land plot 754 square meters.	43.....	Weitenegg.
	ARNSDORF	44.....	Deutsch-Altenburg.
39.....	Agency building.	45.....	Zwentendorf.
		46.....	Kritzendorf.

The property enumerated in Section III is to be transferred with all equipment and inventory.

IV. PROPERTY IN THE CITY OF VIENNA

1. Living house at No. 11, Archduke Karl Square (formerly house No. 6), 2nd District, standing on its own land.
2. Freehold land and house at 204 Handelskai, 2nd District.
3. Freehold building plots in Wehlistrasse, 2nd District, Catastral Registry Nos. 1660, 1661, 1662.
4. Leased land plot at No. 286 Handelskai, 2nd District.

The property enumerated in Section IV is to be transferred with all equipment and inventory.

NOTE TO SECTIONS II, III AND IV

The land, occupied by the Port area mentioned in Section II of the present list, and also by the agency buildings, river stations, warehouses and other buildings, enumerated in Sections III and IV of the present list and also all property indicated in Sections II, III and IV are to be transferred to the U.S.S.R. on the same legal basis on which this land and other property were held by the D. D. S. G., with the proviso that the land and other property owned by the D. D. S. G. on 8th May, 1945, pass into the ownership of the U.S.S.R.

In cases where agreements which established the legal basis for the transfer of land to the D. D. S. G. did not provide for the transfer to the D. D. S. G. of the ownership rights to this land, the Austrian Government shall be obliged to formalize the transfer to the U.S.S.R. of rights, acquired by the D. D. S. G. by such agreements, and to prolong the validity of the latter for an indefinite period with the proviso that in the future the validity of such agreements shall not be canceled without the consent of the Government of the U.S.S.R.

The extent of the Soviet Union's liabilities in respect of these agreements is to be determined by agreement between the Government of the U.S.S.R. and the Government of Austria. These liabilities shall not exceed the liabilities undertaken by the D. D. S. G. in accordance with agreements concluded on or before 8th May, 1945.

V. VESSELS, BELONGING TO THE D. D. S. G. LOCATED IN EASTERN AUSTRIA
AND TO BE TRANSFERRED TO U.S.S.R.

No.	Type of Vessel	Present Name	Old Name	Horse Power	Cargo carrying capacity
1....	Tug.....	"Vladivostok"	"Persenbeug".....	1000	.....
2....	Tug.....	"Cronstadt" ..	"Bremen".....	800	.....
3....	Passenger steamer.....	"Caucasus"...	"Hellios".....	1100	.....
4....	Dumb tanker barge..	104.....	"DDSG-09714".....		967
5....	".....	144.....	"DDSG-09756".....		974
6....	".....	161.....	"DDSG-05602".....		548
7....	".....	09765.....	"DDSG-09765".....		952
8....	".....	29.....	"DDSG-XXIX".....		1030
9....	Dumb dry cargo barge	22.....	(Taken over after completion)		972
10....	".....	23.....	".....		972
11....	".....	EL-72.....	"DDSG-EL-72".....		180
12....	".....	654.....	"DDSG-67277".....		669
13....	".....	689.....	"DDSG-6566".....		657
14....	".....	1058.....	"DDSG-1058".....		950
15....	".....	5016.....	"DDSG-5016".....		520
16....	".....	5713.....	"DDSG-5713".....		576
17....	".....	5728.....	"DDSG-5728".....		602
18....	".....	6746.....	"DDSG-6746".....		670
19....	".....	65204.....	"DDSG-65204".....		650
20....	".....	67173.....	"DDSG-67173".....		670
21....	".....	10031.....	"DDSG-10031".....		942
22....	".....	5015.....	"DDSG-5015".....		511
23....	".....	6525.....	"DDSG-6525".....		682
24....	".....	67266.....	"DDSG-67266".....		680
25....	Lighter.....	304.....	"Johanna".....		30
26....	".....	411.....	"V-238".....		40
27....	Double funnel pontoon	RP-IV.....	"RP-IV".....		.....
28....	".....	RP-VI.....	"DDSG-RP-VI".....		.....
29....	".....	RP-XX.....	"DDSG-RP-XX".....		.....
30....	Landing Stage.....	EP-97.....	"DDSG-EP-9721".....		.....
31....	Pontoon.....	EP-120.....	"DDSG-EP-120".....		.....
32....	Deckless Lighter.....	"Trauner".....	"Trauner".....		.....
33....	Floating Crane.....	P-1.....	(nameless).....		.....
34....	".....	P-2.....	"DDSG-21".....		.....
35....	Pontoon.....	PT-7.....	.....		.....
36....	".....	PT-8.....	.....		.....

ARTICLE 23—AUSTRIAN PROPERTY IN GERMANY AND RENUNCIATION OF
CLAIMS BY AUSTRIA ON GERMANY

1. From the date of the coming into force of the present Treaty the property in Germany of the Austrian Government or of Austrian nationals, including property forcibly removed from Austrian territory to Germany after 12th March, 1938 shall be returned to its owners. This provision shall not apply to the property of war criminals or persons who have been subjected to the penalties of denazification measures; such property shall

erty, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force exerted by Axis Governments or their agencies between the beginning of hostilities between Germany and the United Nation concerned and 8th May, 1945.

4. (a) In cases in which the Austrian Government provides compensation for losses suffered by reason of injury or damage to property in Austria which occurred during the German occupation of Austria or during the war, United Nations nationals shall not receive less favorable treatment than that accorded to Austrian nationals; and in such cases United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 8 (a) of this Article shall receive compensation based on the total loss or damage suffered by the corporations or associations and bearing the same proportion to such loss or damage as the beneficial interest of such nationals bears to the capital of the corporation or association.

(b) The Austrian Government shall accord to United Nations and their nationals the same treatment in the allocation of materials for the repair or rehabilitation of their property in Austria and in the allocation of foreign exchange for the importation of such materials as applies to Austrian nationals.

5. All reasonable expenses incurred in Austria in establishing claims, including the assessment of loss or damage, shall be borne by the Austrian Government.

6. United Nations nationals and their property shall be exempted from any exceptional taxes, levies, or imposts imposed on their capital assets in Austria by the Austrian Government or by any Austrian authority between the date of the surrender of the German armed forces and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces. Any sums which have been so paid shall be refunded.

7. The owner of the property concerned and the Austrian Government may agree upon arrangements in lieu of the provisions of this Article.

8. As used in this Article:

(a) "United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on 8th May, 1945.

The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Austria during the war, were treated as enemy.

(b) "Owner" means one of the United Nations, or a national of one of the United Nations, as defined in sub-paragraph (a) above, who is entitled to the property in question, and includes a successor of the owner, provided that the successor is also a United Nation or a

United Nations national as defined in sub-paragraph (a). If the successor has purchased the property in its damaged state, the transferor shall retain his rights to compensation under this Article, without prejudice to obligations between the transferor and the purchaser under domestic law.

(c) "Property" means all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as all rights or interests of any kind in property.

9. The provisions of this Article do not apply to transfers of property, rights or interests of United Nations or United Nations nationals in Austria made in accordance with laws and enactments which were in force as Austrian Law on 28th June 1946.

10. The Austrian Government recognizes that the Brioni Agreement of 10th August, 1942 is null and void. It undertakes to participate with the other signatories of the Rome Agreement of 21st March, 1923, in any negotiations having the purpose of introducing into its provisions the modifications necessary to ensure the equitable settlement of the annuities which it provides.

ARTICLE 26—PROPERTY, RIGHTS AND INTERESTS OF MINORITY GROUPS IN AUSTRIA

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.

2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims of persecution by the Axis Powers, it being understood that these provisions do not require Austria to make payments in foreign exchange or other transfers to foreign countries which would constitute a burden on the Austrian economy. Such transfer shall be effected within eighteen months from the coming into force of the present Treaty and shall include property, rights and interests required to be restored under paragraph 1 of this Article.

ARTICLE 27—AUSTRIAN PROPERTY IN THE TERRITORY OF THE ALLIED AND ASSOCIATED POWERS

1. The Allied and Associated Powers declare their intention to return Austrian property, rights and interests as they now exist in their territories or the proceeds arising out of the liquidation, disposal or realization of such property, rights or interests, subject to accrued taxes, expenses of administration, creditor claims and other like charges, where such property, rights or interests have been liquidated, disposed of or otherwise realized. The Allied and Associated Powers will be prepared to conclude agreements with the Austrian Government for this purpose.

2. Notwithstanding the foregoing provisions, the Federal Peoples' Republic of Yugoslavia shall have the right to seize, retain or liquidate Austrian property, rights and interests within Yugoslav territory on the coming into force of the present Treaty. The Government of Austria undertakes to compensate Austrian nationals whose property is taken under this paragraph.

ARTICLE 28—DEBTS

1. The Allied and Associated Powers recognize that interest payments and similar charges on Austrian Government securities falling due after 12th March, 1938, and before 8th May, 1945, constitute a claim on Germany and not on Austria.

2. The Allied and Associated Powers declare their intention not to avail themselves of the provisions of loan agreements made by the Government of Austria before 13th March, 1938, in so far as those provisions granted to the creditors a right of control over the government finances of Austria.

3. The existence of the state of war between the Allied and Associated Powers and Germany shall not, in itself, be regarded as affecting the obligation to pay pecuniary debts arising out of obligations and contracts that existed, and rights that were acquired before the existence of the state of war, which became payable prior to the coming into force of the present Treaty, and which are due by the Government or nationals of Austria to the Government or nationals of one of the Allied and Associated Powers or are due by the Government or nationals of one of the Allied and Associated Powers to the Government or nationals of Austria.

4. Except as otherwise expressly provided in the present Treaty, nothing therein shall be construed as impairing debtor-creditor relationships arising out of contracts concluded at any time prior to 1st September, 1939, by either the Government of Austria or persons who were nationals of Austria on 12th March, 1938.

PART VI—GENERAL ECONOMIC RELATIONS

ARTICLE 29

1. Pending the conclusion of commercial treaties or agreements between individual United Nations and Austria, the Government of Austria shall, during a period of eighteen months from the coming into force of the present

Treaty, grant the following treatment to each of the United Nations which, in fact, reciprocally grants similar treatment in like matters to Austria:

(a) In all that concerns duties and charges on importation or exportation, the internal taxation of imported goods and all regulations pertaining thereto, the United Nations shall be granted unconditional most-favored-nation treatment;

(b) In all other respects, Austria shall make no arbitrary discrimination against goods originating in or destined for any territory of any of the United Nations as compared with like goods originating in or destined for territory of any other of the United Nations or of any other foreign country;

(c) United Nations nationals, including juridical persons, shall be granted national and most-favored-nation treatment in all matters pertaining to commerce, industry, shipping and other forms of business activity within Austria. These provisions shall not apply to commercial aviation;

(d) Austria shall grant no exclusive or preferential rights to any country with regard to the operation of commercial aircraft in international traffic, shall afford all the United Nations equality of opportunity in obtaining international commercial aviation rights in Austrian territory, including the right to land for refueling and repair, and, with regard to the operation of commercial aircraft in international traffic, shall grant on a reciprocal and non-discriminatory basis to all United Nations the right to fly over Austrian territory without landing. These provisions shall not affect the interests of the national defense of Austria.

2. The foregoing undertaking by Austria shall be understood to be subject to the exceptions customarily included in commercial treaties concluded by Austria prior to 13th March, 1938; and the provisions with respect to reciprocity granted by each of the United Nations shall be understood to be subject to the exceptions customarily included in the commercial treaties concluded by that State.

PART VII—SETTLEMENT OF DISPUTES

ARTICLE 30

1. Any disputes which may arise in giving effect to the Article entitled "United Nations Property in Austria" of the present Treaty shall be referred to a Conciliation Commission established on a parity basis consisting of one representative of the Government of the United Nation concerned and one representative of the Government of Austria. If within three months after the dispute has been referred to the Conciliation Commission no agreement has been reached, either Government may ask for the addition to the Commission of a third member selected by mutual agreement of the two Governments from nationals of a third country. Should the two Governments fail to agree within two months on the selection of a third member of the Commission, either Government may request

the Heads of the Diplomatic Missions in Vienna of the Soviet Union, of the United Kingdom, of the United States of America, and of France to make the appointment. If the Heads of Mission are unable to agree within a period of one month upon the appointment of a third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. When any Conciliation Commission is established under paragraph 1 of this Article, it shall have jurisdiction over all disputes which may thereafter arise between the United Nation concerned and Austria in the application or interpretation of the Article referred to in paragraph 1 of this Article and shall perform the functions attributed to it by these provisions.

3. Each Conciliation Commission shall determine its own procedure, adopting rules conforming to justice and equity.

4. Each Government shall pay the salary of the member of the Conciliation Commission whom it appoints and of any agent whom it may designate to represent it before the Commission. The salary of the third member shall be fixed by special agreement between the Governments concerned and this salary, together with the common expenses of each Commission, shall be paid in equal shares by the two Governments.

5. The parties undertake that their authorities shall furnish directly to the Conciliation Commission all assistance which may be within their power.

6. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.

PART VIII—MISCELLANEOUS ECONOMIC PROVISIONS

ARTICLE 31—PROVISIONS RELATING TO THE DANUBE

Navigation on the Danube shall be free and open for the nationals, vessels of commerce, and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. The foregoing shall not apply to traffic between ports of the same State.

ARTICLE 32—TRANSIT FACILITIES

1. Austria shall facilitate as far as possible railway traffic in transit through its territory at reasonable rates and shall be prepared to conclude with neighboring States reciprocal agreements for this purpose.

2. The Allied and Associated Powers undertake to support inclusion in the settlement in relation to Germany of provisions to facilitate transit and communication without customs duties or charges between Salzburg and Lofer (Salzburg) across the Reichenhall-Steinpass and between Scharnitz (Tyrol) and Ehrwald (Tyrol) via Garmisch-Partenkirchen.

ARTICLE 33—SCOPE OF APPLICATION

The Articles entitled "United Nations Property in Austria" and "General Economic Relations" of the present Treaty shall apply to the Allied

and Associated Powers and to those of the United Nations which had that status on 8th May, 1945, and whose diplomatic relations with Germany were broken off during the period between 1st September, 1939 and 1st January, 1945.

PART IX—FINAL CLAUSES

ARTICLE 34—HEADS OF MISSION

1. For a period not to exceed eighteen months from the coming into force of the present Treaty, the Heads of the Diplomatic Missions in Vienna of the Soviet Union, the United Kingdom, the United States of America and France, acting in concert, will represent the Allied and Associated Powers in dealing with the Government of Austria in all matters concerning the execution and interpretation of the present Treaty.

2. The Four Heads of Mission will give the Government of Austria such guidance, technical advice and clarification as may be necessary to ensure the rapid and efficient execution of the present Treaty both in letter and in spirit.

3. The Government of Austria shall afford to the said Four Heads of Mission all necessary information and any assistance which they may require in the fulfillment of the tasks devolving on them under the present Treaty.

ARTICLE 35—INTERPRETATION OF THE TREATY

1. Except where another procedure is specifically provided under any Article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty which is not settled by direct diplomatic negotiations shall be referred to the Four Heads of Mission acting under Article 34, except that in this case the Heads of Mission will not be restricted by the time limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.

ARTICLE 36—FORCE OF ANNEXES

The provisions of the Annexes shall have force and effect as integral parts of the present Treaty.

ARTICLE 37—ACCESSION TO THE TREATY

1. Any member of the United Nations which on 8th May, 1945 was at war with Germany and which then had the status of a United Nation and

is not a signatory to the present Treaty, may accede to the Treaty and upon accession shall be deemed to be an Associated Power for the purposes of the Treaty.

2. Instruments of accession shall be deposited with the Government of the Union of Soviet Socialist Republics and shall take effect upon deposit.

ARTICLE 38—RATIFICATION OF THE TREATY

1. The present Treaty, of which the Russian, English, French and German texts are authentic, shall be ratified. It shall come into force immediately upon deposit of instruments of ratification by the Union of Soviet Socialist Republics, by the United Kingdom of Great Britain and Northern Ireland, by the United States of America, and by France of the one part and by Austria of the other part. The instruments of ratification shall, in the shortest time possible, be deposited with the Government of the Union of Soviet Socialist Republics.

2. With respect to each Allied and Associated Power whose instrument of ratification is thereafter deposited, the Treaty shall come into force upon the date of deposit. The present Treaty shall be deposited in the archives of the Government of the Union of Soviet Socialist Republics, which shall furnish certified copies to each of the signatory and acceding States.

ANNEX I

DEFINITION AND LIST OF WAR MATERIEL

The term "war materiel" as used in the present Treaty shall include all arms, ammunition and implements specially designed or adapted for use in war as listed below.

The Allied and Associated Powers reserve the right to amend the list periodically by modification or addition in the light of subsequent scientific development.

CATEGORY I

1. Military rifles, carbines, revolvers and pistols; barrels for these weapons and other spare parts not readily adaptable for civilian use.

2. Machine guns, military automatic or auto-loading rifles, and machine-pistols; barrels for these weapons and other spare parts not readily adaptable for civilian use; machine gun mounts.

3. Guns, howitzers, mortars (Minenwerfer), cannon special to aircraft, breechless or recoilless guns and flamethrowers; barrels and other spare parts not readily adaptable for civilian use; carriages and mountings for the foregoing.

4. Rocket projectors; launching and control mechanisms for self-propelling and guided missiles and projectiles; mountings for same.

5. Self-propelling and guided missiles, projectiles, rockets, fixed ammunition and cartridges, filled or unfilled, for the arms listed in sub-paragraphs 1-4 above, and fuses, tubes or contrivances to explode or operate them. Fuses required for civilian use are not included.

6. Grenades, bombs, torpedoes, mines, depth charges and incendiary materials or charges, filled or unfilled; all means for exploding or operating them. Fuses required for civilian use are not included.

7. Bayonets.

CATEGORY II

1. Armoured fighting vehicles; armoured trains, not technically convertible to civilian use.

2. Mechanical and self-propelled carriages for any of the weapons listed in Category I; special type military chassis or bodies other than those enumerated in sub-paragraph 1 above.

3. Armour plate, greater than three inches in thickness, used for protective purposes in warfare.

CATEGORY III

1. Aiming and computing devices for the preparation and control of fire, including predictors and plotting apparatus, for fire control; direction of fire instruments; gun sights; bomb sights; fuse setters; equipment for the calibration of guns and fire control instruments.

2. Assault bridging, assault boats and storm boats.

3. Deceptive warfare, dazzle and decoy devices.

4. Personal war equipment of a specialized nature not readily adaptable to civilian use.

CATEGORY IV

1. Warships of all kinds, including converted vessels and craft designed or intended for their attendance or support, which cannot be technically reconverted to civilian use, as well as weapons, armour, ammunition, aircraft and all other equipment, material, machines and installations not used in peace time on ships other than warships.

2. Landing craft and amphibious vehicles or equipment of any kind; assault boats or devices of any type as well as catapults or other apparatus for launching or throwing aircraft, rockets, propelled weapons or any other missile, instruments or devices whether manned or unmanned, guided or uncontrolled.

3. Submersible or semi-submersible ships, craft, weapons, devices, or apparatus of any kind, including specially designed harbor defense booms, except as required by salvage, rescue or other civilian uses, as well as all equipments, accessories, spare parts, experimental or training aids, instruments or installations as may be specially designed for the construction, testing, maintenance or housing of the same.

CATEGORY V

1. Aircraft assembled or unassembled, both heavier and lighter than air, which are designed or adapted for aerial combat by the use of machine

guns, rocket projectors or artillery, or for the carrying and dropping of bombs, or which are equipped with, or which by reason of their design or construction are prepared for, any of the appliances referred to in subparagraph 2 below.

2. Aerial gun mounts and frames, bomb racks, torpedo carriers and bomb release or torpedo release mechanisms; gun turrets and blisters.

3. Equipment specially designed for and used solely by airborne troops.

4. Catapults or launching apparatus for shipborne, land-or-sea-based aircraft; apparatus for launching aircraft weapons.

5. Barrage balloons.

CATEGORY VI

Asphyxiating, vesicant, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements.

CATEGORY VII

Propellants, explosives, pyrotechnics or liquefied gases destined for propulsion, explosion, charging, or filling of, or for use in connection with, the war materiel in the present categories, not capable of civilian use or manufactured in excess of civilian requirements.

CATEGORY VIII

Factory and tool equipment specially designed for the production and maintenance of the materiel enumerated above and not technically convertible to civilian use.

ANNEX II

Having regard to the arrangements made between the Soviet Union and Austria, and recorded in the Memorandum signed at Moscow on April 15, 1955, Article 22 of the present Treaty shall have effect subject to the following provisions:

1. On the basis of the pertinent economic provisions of the April 15, 1955 arrangements between the Soviet Union and Austria, the Soviet Union will transfer to Austria within two months from the date of entry into force of the present Treaty, all property, rights and interests to be retained or received by it in accordance with Article 22, except the Danube Shipping Company (D. D. S. G.) assets in Hungary, Roumania and Bulgaria.

2. It is agreed that in respect of any property, right or interest transferred to Austria in accordance with this Annex, Austria's rights shall be limited only in the manner set out in paragraph 13 of Article 22.

IN FAITH WHEREOF the undersigned Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

DONE in the City of Vienna in the Russian, English, French and German languages this day of May 15, 1955.

[SEAL] Signed VYACHESLAV MIKHAILOVICH MOLOTOV
[SEAL] Signed IVAN I. ILYICHEV
[SEAL] Signed HAROLD MACMILLAN
[SEAL] Signed GEOFFREY WALLINGER
[SEAL] Signed JOHN FOSTER DULLES
[SEAL] Signed LLEWELLYN E. THOMPSON
[SEAL] Signed A. PINAY
[SEAL] Signed R. LALOUETTE
[SEAL] Signed LEOPOLD FIGL

[Translation]

MEMORANDUM¹

CONCERNING THE RESULTS OF THE CONVERSATIONS BETWEEN THE GOVERNMENT DELEGATION OF THE REPUBLIC OF AUSTRIA AND THE GOVERNMENT DELEGATION OF THE SOVIET UNION

I.

In the course of conversations regarding the earliest conclusion of the Austrian State Treaty in Moscow from the 12th to the 15th of April 1955 agreement was reached between the Soviet and the Austrian delegations that, with regard to the declarations made by the members of the Soviet Government—the Deputy Chairman of the Council of Ministers and the Minister for Foreign Affairs of the U.S.S.R., V. M. Molotov, and the Deputy Chairman of the Council of Ministers of the U.S.S.R., A. I. Mikheyev—Federal Chancellor Ing. Julius Raab, Vice Chancellor Dr. Adolf Schaerf, Foreign Minister Dr. h. c. Ing. Leopold Figl, State Secretary Dr. Bruno Kreisky in connection with the conclusion of the Austrian State Treaty will see to it that the following decisions and measures of the Austrian Federal Government are brought about.

1.) In the sense of the declaration already given by Austria at the conference in Berlin in 1954 to join no military alliances and to permit no military bases on its territory, the Austrian Federal Government will make a declaration in a form which will obligate Austria internationally to practice in perpetuity a neutrality of the type maintained by Switzerland.

2.) The Austrian Federal Government will submit this Austrian declaration in accordance with the terms of the Federal Constitution to the Austrian Parliament for decision immediately after ratification of the State Treaty.

3.) The Federal Government will take all suitable steps to obtain international recognition for the declaration confirmed by the Austrian Parliament.

4.) The Austrian Federal Government will welcome a guarantee by the four great powers of the inviolability and integrity of the Austrian State Territory.

¹ Sen. Exec. G, 84th Cong., 1st Sess., p. 40.

5.) The Austrian Federal Government will seek to obtain from the Governments of France, Great Britain and the United States of America such a guarantee by the four great powers.

6.) The Federal Government will, after return of German assets in the Soviet Zone of Occupation to Austria, take measures which will exclude a transfer of these assets to the possession of foreigners including juridical persons of private or public character.

Furthermore, it will see to it that no discriminating measures will be taken against the employees of the former USIA concerns, of the concerns of the former Soviet mineral oil administration, the Corporation OROP, and of the DDSG.

II.

The Deputy Chairman of the Council of Ministers, V. M. Molotov and A. I. Mikhoyan, made the following declaration in the name of the Soviet Government with regard to the declarations of the Austrian Government delegation:

1.) The Soviet Government is prepared to sign the Austrian State Treaty without delay.

2.) The Soviet Government declares itself to be in agreement that all occupation troops of the four powers be withdrawn from Austria after the entry into force of the State Treaty, no later than on the 31st of December 1955.

3.) The Soviet Government considers Articles 6, 11, 15, 16-bis and 36 as obsolete or superfluous and is prepared to drop these Articles. It is prepared, moreover, to drop also Article 48-bis if Austria is simultaneously prepared to drop its demands against the Soviet Union for the so-called "civilian occupation costs." It will support, moreover, the Austrian Government in its efforts to attain further possible changes in the draft of the State Treaty, and will agree to such changes. However, agreement exists that the negotiations leading to the conclusion of the State Treaty between the four powers and Austria are not to be drawn out unnecessarily by proposals to change the Treaty.

4.) The Soviet Government is prepared to recognize the declaration concerning the neutrality of Austria.

5.) The Soviet Government is prepared to participate in a guarantee by the four powers of the inviolability and integrity of the Austrian State Territory—according to the model of Switzerland.

III.

As a result of the exchange of opinions which has taken place, the delegations have reached the following conclusions:

CONCERNING THE DELIVERY OF GOODS TO THE U.S.S.R. IN COMPENSATION FOR THE VALUE OF SOVIET ENTERPRISES IN AUSTRIA AS HANDED OVER IN ACCORDANCE WITH THE AUSTRIAN STATE TREATY (ARTICLE 35)¹

1.) The Soviet Government is prepared, in the sense of its pledge given at the Conference in Berlin in 1954, to accept Austrian goods in the

¹ Article 22 of final text.

equivalent of 150 million American dollars provided for in Article 35 as a lump sum;

2.) The Soviet delegation takes note of the declaration of the Austrian delegation that the latter accepts as a basis the list of goods which it has received from the Soviet delegation, and in this connection specially authorized representatives of the Austrian Government will go to Moscow not later than the end of May of this year.

3.) The Soviet Delegation also takes note of the declaration of the Austrian delegation that the Austrian Government will form a special commission which will concern itself with the terminal dates and quality of the shipments of goods to the Soviet Union, and specifically in the agreed upon amounts for the lump sum of 150 million American dollars, that is 25 million American dollars annually.

4.) The Austrian delegation has declared itself prepared to guarantee to representatives of the Soviet purchaser the possibility to carry out examinations upon receipt of the goods which are destined to be delivered to the Soviet Union on account of the above-named sum. It is agreed that the delivery of the goods should be free to the Austrian border and at world market prices. The prices and the amount of goods will be agreed upon by both parties annually three months before the beginning of each year. The Austrian National Bank will issue promissory notes to guarantee the above delivery of goods for the sum of 150 million American dollars indicated in the draft of the State Treaty. The promissory notes of the Austrian National Bank will be returned according to the liquidation of the sum by the delivery of goods.

CONCERNING THE TRANSFER TO AUSTRIA OF THE OIL ENTERPRISES HELD BY THE U.S.S.R. IN AUSTRIA

1.) The Soviet delegation accepts the proposal of the Austrian delegation, according to which the Austrian Government in return for the oil fields and oil refineries held by the U.S.S.R. and transferred to Austria will pay the Soviet Union by delivery of crude oil to the extent of one million tons annually for a period of ten years, therefore a total of ten million tons.

The Soviet Delegation takes note of the declaration of the Austrian delegation that the Austrian Government reserves the right to carry out deliveries of the aforementioned quantity of crude oil to the Soviet Union also in shorter periods of time. The crude oil is to be delivered under the following conditions: delivered free to the Austrian border, duty and customs free.

2.) The Austrian delegation has taken note of the declaration of the Soviet delegation that the oil enterprises and oil fields transferred by the Soviet Union to Austria include also the refineries and the company for marketing oil products (OROP).

CONCERNING THE TRANSFER TO AUSTRIA OF ASSETS OF THE DANUBE STEAMSHIP COMPANY IN EASTERN AUSTRIA

The Soviet side transfers to Austria all properties of the Danube Steamship Company, which are located in Eastern Austria, including the ship-

yard in Korneuburg, the ships and dock facilities, for which the Austrian Government will pay simultaneously with the transfer the amount of two million American dollars to the Soviet Union.

CONCERNING TRADE BETWEEN THE SOVIET UNION AND AUSTRIA

1.) Agreement was reached between the Soviet Union and Austria to conclude a trade treaty for a period of five years with an automatic extension as long as no termination of the treaty is brought about by one of the parties.

2.) Furthermore, agreement was reached that a treaty regarding the exchange of goods and payments between Austria and the Soviet Union be concluded for a period of five years, according to which the amount of goods is to be agreed upon annually.

DONE in two copies, in the German and Russian languages, of which both texts are of equal authenticity.

In verification of the above this Memorandum is signed by

For the Government Delegation
of the Soviet Union:
V. M. MOLOTOV
A. I. MIKHAYAN

For the Austrian Delegation:
J. RAAB
A. SCHAEFER
L. FIGL
B. KREISKY

Moscow, 15 April 1955

ALBANIA, BULGARIA, CZECHOSLOVAKIA, GERMAN DEMOCRATIC REPUBLIC, HUNGARY, POLAND, RUMANIA, U.S.S.R.

TREATY OF FRIENDSHIP, COOPERATION AND MUTUAL ASSISTANCE¹

Signed at Warsaw, May 14, 1955; in force June 5, 1955

The Contracting Parties,

reaffirming their desire for the establishment of a system of European collective security based on the participation of all European states irrespective of their social and political systems, which would make it possible to unite their efforts in safeguarding the peace of Europe;

mindful, at the same time, of the situation created in Europe by the ratification of the Paris agreements, which envisage the formation of a new military alignment in the shape of "Western European Union," with the participation of a remilitarized Western Germany and the integration of the latter in the North Atlantic bloc, which increases the danger of another war and constitutes a threat to the national security of the peaceable states;

¹ New Times (Moscow), No. 21 (May 21, 1955), Supp., pp. 65-70.

being persuaded that in these circumstances the peaceable European states must take the necessary measures to safeguard their security and in the interests of preserving peace in Europe;

guided by the objects and principles of the Charter of the United Nations Organization;

being desirous of further promoting and developing friendship, co-operation and mutual assistance in accordance with the principles of respect for the independence and sovereignty of states and of non-interference in their internal affairs,

have decided to conclude the present Treaty of Friendship, Cooperation and Mutual Assistance and have for that purpose appointed as their plenipotentiaries:

the Presidium of the People's Assembly of the People's Republic of Albania: Mehmet Shehu, Chairman of the Council of Ministers of the People's Republic of Albania;

the Presidium of the People's Assembly of the People's Republic of Bulgaria: Vylko Chervenkoy, Chairman of the Council of Ministers of the People's Republic of Bulgaria;

the Presidium of the Hungarian People's Republic: Andras Hegedus, Chairman of the Council of Ministers of the Hungarian People's Republic;

the President of the German Democratic Republic: Otto Grotewohl, Prime Minister of the German Democratic Republic;

the State Council of the Polish People's Republic: Jozef Cyrankiewicz, Chairman of the Council of Ministers of the Polish People's Republic;

the Presidium of the Grand National Assembly of the Rumanian People's Republic: Gheorghe Gheorghiu-Dej, Chairman of the Council of Ministers of the Rumanian People's Republic;

the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics: Nikolai Alexandrovich Bulganin, Chairman of the Council of Ministers of the U.S.S.R.;

the President of the Czechoslovak Republic: Viliam Siroky, Prime Minister of the Czechoslovak Republic,

who, having presented their full powers, found in good and due form, have agreed as follows:

ARTICLE 1

The Contracting Parties undertake, in accordance with the Charter of the United Nations Organization, to refrain in their international relations from the threat or use of force, and to settle their international disputes peacefully and in such manner as will not jeopardize international peace and security.

ARTICLE 2

The Contracting Parties declare their readiness to participate in a spirit of sincere cooperation in all international actions designed to safeguard international peace and security, and will fully devote their energies to the attainment of this end.

The Contracting Parties will furthermore strive for the adoption, in agreement with other states which may desire to cooperate in this, of effective measures for universal reduction of armaments and prohibition of atomic, hydrogen and other weapons of mass destruction.

ARTICLE 3

The Contracting Parties shall consult with one another on all important international issues affecting their common interests, guided by the desire to strengthen international peace and security.

They shall immediately consult with one another whenever, in the opinion of any one of them, a threat of armed attack on one or more of the Parties to the Treaty has arisen, in order to ensure joint defence and the maintenance of peace and security.

ARTICLE 4

In the event of armed attack in Europe on one or more of the Parties to the Treaty by any state or group of states, each of the Parties to the Treaty, in the exercise of its right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations Organization, shall immediately, either individually or in agreement with other Parties to the Treaty, come to the assistance of the state or states attacked with all such means as it deems necessary, including armed force. The Parties to the Treaty shall immediately consult concerning the necessary measures to be taken by them jointly in order to restore and maintain international peace and security.

Measures taken on the basis of this Article shall be reported to the Security Council in conformity with the provisions of the Charter of the United Nations Organization. These measures shall be discontinued immediately the Security Council adopts the necessary measures to restore and maintain international peace and security.

ARTICLE 5

The Contracting Parties have agreed to establish a Joint Command of the armed forces that by agreement among the Parties shall be assigned to the Command, which shall function on the basis of jointly established principles. They shall likewise adopt other agreed measures necessary to strengthen their defensive power, in order to protect the peaceful labours of their peoples, guarantee the inviolability of their frontiers and territories, and provide defence against possible aggression.

ARTICLE 6

For the purpose of the consultations among the Parties envisaged in the present Treaty, and also for the purpose of examining questions which may arise in the operation of the Treaty, a Political Consultative Committee shall be set up, in which each of the Parties to the Treaty shall be

represented by a member of its Government or by another specifically appointed representative.

The Committee may set up such auxiliary bodies as may prove necessary.

ARTICLE 7

The Contracting Parties undertake not to participate in any coalitions or alliances and not to conclude any agreements whose objects conflict with the objects of the present Treaty.

The Contracting Parties declare that their commitments under existing international treaties do not conflict with the provisions of the present Treaty.

ARTICLE 8

The Contracting Parties declare that they will act in a spirit of friendship and cooperation with a view to further developing and fostering economic and cultural intercourse with one another, each adhering to the principle of respect for the independence and sovereignty of the others and non-interference in their internal affairs.

ARTICLE 9

The present Treaty is open to the accession of other states, irrespective of their social and political systems, which express their readiness by participation in the present Treaty to assist in uniting the efforts of the peaceable states in safeguarding the peace and security of the peoples. Such accession shall enter into force with the agreement of the Parties to the Treaty after the declaration of accession has been deposited with the Government of the Polish People's Republic.

ARTICLE 10

The present Treaty is subject to ratification, and the instruments of ratification shall be deposited with the Government of the Polish People's Republic.

The Treaty shall enter into force on the day the last instrument of ratification has been deposited. The Government of the Polish People's Republic shall notify the other Parties to the Treaty as each instrument of ratification is deposited.

ARTICLE 11

The present Treaty shall remain in force for twenty years. For such Contracting Parties as do not at least one year before the expiration of this period present to the Government of the Polish People's Republic a statement of denunciation of the Treaty, it shall remain in force for the next ten years.

Should a system of collective security be established in Europe, and a General European Treaty of Collective Security concluded for this purpose, for which the Contracting Parties will unswervingly strive, the present

Treaty shall cease to be operative from the day the General European Treaty enters into force.

Done in Warsaw on May 14, 1955, in one copy each in the Russian, Polish, Czech and German languages, all texts being equally authentic. Certified copies of the present Treaty shall be sent by the Government of the Polish People's Republic to all the Parties to the Treaty.

In witness whereof the plenipotentiaries have signed the present Treaty and affixed their seals.

For the Presidium of the People's Assembly of the People's Republic
of Albania

MEHMET SHEHU

For the Presidium of the People's Assembly of the People's Republic
of Bulgaria

VYLKO CHERVENKOV

For the Presidium of the Hungarian People's Republic

ANDRAS HEGEDUS

For the President of the German Democratic Republic

OTTO GROTEWOHL

For the State Council of the Polish People's Republic

JOZEF CYRANKIEWICZ

For the Presidium of the Grand National Assembly of the Rumanian
People's Republic

GHEORGHE GHEORGHIU-DEJ

For the Presidium of the Supreme Soviet of the Union of Soviet
Socialist Republics

NIKOLAI ALEXANDROVICH BULGANIN

For the President of the Czechoslovak Republic

VILIAM SROKY

ESTABLISHMENT OF A JOINT COMMAND

OF THE ARMED FORCES OF THE SIGNATORIES TO THE TREATY OF FRIENDSHIP, COOPERATION AND MUTUAL ASSISTANCE

In pursuance of the Treaty of Friendship, Cooperation and Mutual Assistance between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Rumanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic, the signatory states have decided to establish a Joint Command of their armed forces.

The decision provides that general questions relating to the strengthening of the defensive power and the organization of the Joint Armed Forces of the signatory states shall be subject to examination by the Political Consultative Committee, which shall adopt the necessary decisions.

Marshal of the Soviet Union *I. S. Konev* has been appointed Commander-

in-Chief of the Joint Armed Forces to be assigned by the signatory states.

The Ministers of Defence or other military leaders of the signatory states are to serve as Deputy Commanders-in-Chief of the Joint Armed Forces, and shall command the armed forces assigned by their respective states to the Joint Armed Forces.

The question of the participation of the German Democratic Republic in measures concerning the armed forces of the Joint Command will be examined at a later date.

A Staff of the Joint Armed Forces of the signatory states will be set up under the Commander-in-Chief of the Joint Armed Forces, and will include permanent representatives of the General Staffs of the signatory states.

The Staff will have its headquarters in *Moscow*.

The disposition of the Joint Armed Forces in the territories of the signatory states will be effected, by agreement among the states, in accordance with the requirements of their mutual defence.

INDEX TO VOLUME 49, SUPPLEMENT

- Agency of Western European Union for Control of Armaments. Brussels Treaty Protocol. 140.
- Aggression. Arab League Joint Defense and Economic Co-operation Treaty, 51; Greek-Turkish-Yugoslav Mutual Assistance Pact, 48; International Law Commission draft code of offenses against peace and security, 21; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 194.
- Air forces. Brussels Treaty Protocol on Western European Union Forces. 132.
- Air traffic to and from Berlin. Convention on Settlement of Matters Arising out of the War and Occupation. 112.
- Air transport, international. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 111.
- Aircraft. Annex to Austrian State Treaty. 189.
- Airspace over territorial sea, jurisdiction of. International Law Commission draft articles. 27.
- Albania, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Rumania, U.S.S.R. Treaty of Friendship, Co-operation and Mutual Assistance. 194.
- Allied and Associated Powers-Austria. State Treaty for the Re-establishment of an Independent and Democratic Austria. 162; Annexes, 188, 190.
- Allied High Commission for Germany. Courts of, Convention on Settlement of Matters Arising out of the War and Occupation, 73; Proclamation revoking Occupation Statute, 146.
- American Republics. Copyright agreements and conventions. Universal Copyright Convention. 155.
- Annexation of territory. International Law Commission draft code of offenses against peace and security. 22.
- Ammunition. Brussels Treaty Protocol on Control of Armaments, 136; Annex, 140.
- Arab League. Joint Defense and Economic Co-operation Treaty. 51.
- Arbitral Commission on Property, Rights and Interests in Germany. Convention on Settlement of Matters Arising out of the War and Occupation, 94, 107; Charter of, 113; competence, powers, and applicable law, 116; procedure, 117.
- Arbitration Tribunal, France, United Kingdom, United States-Federal Republic of Germany. Convention on Relations, 60; Charter of, 62; competence and powers, 65, Agreement on Tax Treatment of Forces and Their Members, 125.
- Armaments. Austrian State Treaty, 166, 167, Annex, 188; control of: Brussels Treaty Protocol, 134, 136, Annex, 139; Agency of Western European Union for, Brussels Treaty Protocols, 130, 140.
- Armed attack. Arab League Joint Defense and Economic Co-operation Treaty, 51; Greek-Turkish-Yugoslav Mutual Assistance Pact, 48; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 196.
- Armed bands, incursions of. International Law Commission draft code of offenses against peace and security of mankind. 19, 22.
- Armed forces. Brussels Treaty Protocol on Western European Union Forces, 132; in German Federal Republic: Agreement on Tax Treatment, 123; Convention on Presence of, 120; Convention on Relations between the Three Powers and the Federal Republic of Germany, 58.
- Armored vehicles. Brussels Treaty Protocol on Control of Armaments. 136; Annex, 139.
- Arrest of vessels. International Law Commission draft articles on territorial sea. 41.
- Arrest on board foreign vessels. International Law Commission draft articles on territorial sea. 39.
- Atomic weapons. Brussels Treaty Protocol on Control of Armaments, 136, Annex, 139; prohibited: Austrian State Treaty, 166; Brussels Treaty Protocol, 135, Annexes, 137.

Austria:

- Armed forces. Service in. Austrian State Treaty. 165.
- German assets in. Austrian State Treaty, 169, 172; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 97.
- Independence of. State Treaty. 163.
- Oil. Concessions, State Treaty, 169, 172, 173; deliveries, Austro-Soviet Memorandum, April 15, 1955, 193; enterprises, Austro-Soviet Memorandum, April 15, 1955, 193, State Treaty, 170, 175; refineries, Austrian State Treaty, 170, 174.
- Permanent neutrality. Austro-Soviet Memorandum, April 15, 1955. 191, 192.
- Property. In Germany, State Treaty, 179; in territory of Allied and Associated Powers, State Treaty, 184; in Yugoslavia, State Treaty, 184.
- State Treaty for Re-establishment of. 162; Annexes, 188, 190; Austro-Soviet Memorandum, April 15, 1955, 191; execution and interpretation, 187.
- Waiver of claims against Allied and Associated Powers, State Treaty, 180; against Germany, State Treaty, 180.
- Withdrawal of Allied Forces from. State Treaty, 168; Austro-Soviet Memorandum, 192.
- Austria—U.S.S.R. Arbitration Commission, Austrian State Treaty, 171; Memorandum of April 15, 1955, 191.
- Authors, rights of. Universal Copyright Convention. 149.
- Aviation, international. Austrian State Treaty, 185; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 111.
- Balkan Mutual Assistance Pact. 51.
- Base lines. International Law Commission draft articles on territorial sea. 27, 28.
- Belgium. Armed forces in Europe. Brussels Treaty Protocol on Western European Union Forces. 132.
- Berlin. Air traffic to and from, Convention on Settlement of Matters Arising out of the War and Occupation, 112; rights of the Three Powers respecting, Convention on Relations with Federal Republic of Germany, 57, 59, 112.
- Berne Convention on Protection of Literary and Artistic Works. Universal Copyright Convention, 155; Appendix Declaration, 156.
- Biological weapons. Brussels Treaty Protocol on Control of Armaments, 136, Annex, 139; prohibited: Austrian State Treaty, 166, Annex, 190; Brussels Treaty Protocol, 135, Annexes, 137, 138.
- Bomber aircraft. Manufacture by Germany prohibited. Brussels Treaty Protocol on Control of Armaments, 135; Annexes, 137, 139.
- Bombs, aircraft. Brussels Treaty Protocol on Control of Armaments. 136; Annex, 140.
- Bonn Conventions and Agreements relating to Germany. Protocol on Termination of Occupation Regime. 55.
- Boundaries. Austrian State Treaty, 163; Convention on Relations between the Three Powers and the German Federal Republic, 59.
- Brioni Agreement, 1942. Austrian State Treaty. 183.
- Brussels Treaty Powers-German Federal Republic-Italy. Protocol Modifying and Completing Brussels Treaty of 1948, 128; Protocol on Control of Armaments, 134; Protocol on Agency of Western European Union, 140; Protocol on Forces of Western European Union, 131.
- Cabotage rights in air transport. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 111, 112.
- Chemical weapons. Brussels Treaty Protocol on Control of Armaments, 136, Annex, 139; prohibited: Austrian State Treaty, 166, Annex, 190; Brussels Treaty Protocol on Control of Armaments, 135, Annexes, 137, 138.
- Chicago Convention on International Civil Aviation. Adherence by German Federal Republic. Convention on Settlement of Matters Arising out of the War and Occupation. 111.
- Civil aircraft. Austrian State Treaty. 167.

- Civil aviation. Austrian State Treaty, 185; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 110.
- Civil jurisdiction over vessels. International Law Commission draft articles on territorial sea. 41.
- Civil rights. Austrian State Treaty, 164; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 71.
- Civil strife, fomenting of. International Law Commission draft code of offenses against peace and security. 22.
- Claims. Against Allied and Associated Powers, waiver of, Austrian State Treaty, 180; against foreign nations or nationals, Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 99; against Germany, waiver of, Austrian State Treaty, 180; restitution, Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 79, 90, 95, 101, 109; war, Austrian State Treaty, 169, 180.
- Coal and steel industries. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 77.
- Coastal state, rights and duties of. International Law Commission draft articles on territorial sea. 37.
- Collective security. Arab League Joint Defense and Economic Co-operation Treaty, 51; Greek-Turkish-Yugoslav Mutual Assistance Pact, 47; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 194.
- Commerce. National and most-favored-nation treatment. Austrian State Treaty. 185.
- Compensation claims. Austrian State Treaty, 180, 182, 183; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 82, 89, 93, 95.
- Conciliation Commission. Austrian State Treaty. 185.
- Conspiracy. International Law Commission draft code of offenses against peace and security. 22.
- Copyright. Universal Convention, 1952. 149.
- Council of Western European Union. Brussels Treaty Protocols. 130, 133, 135, 141.
- Crimes in international law. International Law Commission draft code of offenses against peace and security of mankind, 19, 21; report, 17.
- Crimes on board vessels, jurisdiction of. International Law Commission draft articles on territorial sea. 39.
- Criminals, sentence and custody of. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 75.
- Cultural property, restitution of. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 90.
- Danube navigation. Austrian State Treaty. 186.
- Danube Shipping Company. Assets of. Austrian State Treaty, 170, 175; Austro-Soviet Memorandum, April 15, 1955, 193.
- Debts. Austrian State Treaty, 184; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 102.
- Demilitarization. Protocol on Termination of Occupation Regime in Germany. 55.
- Diplomatic and consular premises. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 79.
- Disarmament. Protocol on Termination of Occupation Regime in Germany. 55.
- Discriminatory treatment of foreign property, rights and interests. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 101.
- Displaced persons. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 98.
- Disputes, settlement of. Austrian State Treaty, 185; Convention on Relations between the Three Powers and the German Federal Republic, 60.
- Economic co-operation. Arab League Treaty of Joint Defense and. 51, 52.
- Economic Council. Arab League Joint Defense and Economic Co-operation Treaty. 53.
- Economic relations. Austrian State Treaty. 184, 186.

- Enemy property claims. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 99, 101.
- Federal Higher Authority, Germany. Convention on Settlement of Matters Arising out of the War and Occupation. 90, 95, 108.
- Forces of Western European Union. Brussels Treaty Protocol. 131.
- Foreign creditors. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 102.
- Foreign forces in Germany. Convention on Presence of, 120; Tax Treatment Agreement, 123.
- Foreign interests in Germany. Convention on Settlement of Matters Arising out of the War and Occupation. 101.
- Foreign vessels. Arrest on board, International Law Commission draft articles on territorial sea, 39; duties of, International Law Commission draft articles on territorial sea, 38, 43.
- Four-Power Commission, Joint. Protocol on Termination of Occupation Regime in Germany. 56.
- France. Armed forces in Europe, Brussels Treaty Protocol, 132; in Germany, Convention on Presence of Foreign Forces, 120.
- France, United Kingdom, United States. Retained rights in Germany: Agreement on Exercise of, 122; Convention on Relations with German Federal Republic, 57, 58, 59; Protocol on Termination of Occupation Regime, 55; rights respecting Berlin, Convention on Relations with German Federal Republic, 57, 59, 60.
- France, United Kingdom, United States—Federal Republic of Germany: Agreement on Tax Treatment of the Forces and Their Members. 123.
- Arbitral Commission on Property, Rights and Interests in Germany. Charter of, 113; competence, powers, and applicable law, 116; procedure, 117.
- Arbitration Tribunal. Charter of, 62; competence and powers, 65, Agreement on Tax Treatment of Forces and Their Members, 125.
- Convention on Presence of Foreign Forces in the Federal Republic of Germany. 120.
- Convention on Relations. 57.
- Convention on Settlement of Matters Arising out of the War and Occupation. 69.
- Protocol on Termination of the Occupation Regime. 55.
- Genocide. International Law Commission draft code of offenses against peace and security. 22.
- German external assets. Convention on Settlement of Matters Arising out of the War and Occupation, 97; in Austria: Austrian State Treaty, 169, Annex, 190; Austro-Soviet Memorandum, April 15, 1955, 192.
- German Federal Republic:
- Accession to North Atlantic Treaty. Protocol on. 126.
- Armaments manufacture prohibited. Brussels Treaty Protocol, 135; Annexes, 137, 138.
- Armed forces in Europe. Brussels Treaty Protocol on Western European Union Forces. 132.
- Courts, jurisdiction of. Convention on Settlement of Matters Arising out of the War and Occupation. 71.
- Federal Higher Authority. Convention on Settlement of Matters Arising out of the War and Occupation. 90, 95, 108.
- Foreign forces in. Agreement on Tax Treatment, 123; Convention on Presence of, 120.
- Foreign interests in. Convention on Settlement of Matters Arising out of the War and Occupation. 101.
- Naval forces. Brussels Treaty Protocol on Western European Union Forces. 133.
- Occupation of. Allied High Commission Proclamation revoking Statute, 146; Convention on Settlement of Matters Arising out of War and, 69; Protocol on Termination of, 55.

- Property, rights and interests in. Convention on Settlement of Matters Arising out of the War and Occupation, 79, 94, 101, 107; Arbitral Commission: Charter, 113, competence, powers and applicable law, 116, procedure, 117.
- Relations between the Three Powers and. Convention on. 57.
- Tripartite Agreement on Exercise of Retained Rights in. 122.
- U. S. Executive Order on authority and functions in. 147.
- Germany. Agreements, conventions and protocols relating to, 1952 and 1954, 55; Anschluss with Austria prohibited, Austrian State Treaty, 163; boundaries, Convention on Relations between the Three Powers and German Federal Republic, 59; claims against, waiver of, Austrian State Treaty, 180; rearmament of, Austrian State Treaty, 167; recognition of Austrian independence, Austrian State Treaty, 163; reunification of, Convention on Relations between the Three Powers and German Federal Republic, 57, 59, 61; war claims, Convention on Settlement of Matters Arising out of the War and Occupation, 99.
- Goods, delivery of. Austro-Soviet Memorandum, April 15, 1955. 192.
- Government-owned commercial vessels. International Law Commission draft articles on territorial sea. 42.
- Greece-Turkey-Yugoslavia. Mutual Assistance Pact. 47.
- Human rights. Austrian State Treaty. 164.
- Identifiable property. Restitution to Nazi victims. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 79.
- I. G. Farbenindustrie A.G.i. L., liquidation of. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 78.
- Immunity from suit. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 76.
- Industrial, literary and artistic property rights. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 106.
- Inhuman acts. International Law Commission draft code of offenses against peace and security. 20, 22.
- Innocent passage. International Law Commission draft articles on territorial sea. 37.
- Inter-American bodies for codification of international law, co-operation with. Report of International Law Commission. 44.
- Inter-Governmental Committee on Copyright. Universal Copyright Convention, 153; Conference Resolution, 156.
- International agreements, rights and obligations under. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 71.
- International Law Commission. Draft code of offenses against peace and security of mankind, 19, 21, report, 17; draft conventions on elimination and reduction of future statelessness, 6; proposed articles on reduction of present statelessness, 15; provisional articles on regime of the territorial sea, 26, report, 23; work of Sixth Session, report, 1.
- International organizations, works of. Protocol to Universal Copyright Convention. 160.
- International peace and security. International Law Commission Draft Code of Offenses against, 19, 21, report, 17; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 194.
- International protection of copyright. Universal Copyright Convention. 149.
- Intervention. International Law Commission draft code of offenses against peace and security. 19, 22.
- Islands. International Law Commission draft articles on territorial sea. 31.
- Italy. Armed forces in Europe. Brussels Treaty Protocol on Western European Union Forces. 132.
- Joint Command. Warsaw Treaty of Friendship, Co-operation and Mutual Assistance. 196, 198.
- Joint Defense Council. Arab League Joint Defense Treaty. 52, 53.

- Legislation, repeal of. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 69.
- Limitation periods. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 102.
- Literary, scientific and artistic works, rights in. Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 106; Universal Copyright Convention, 149.
- Luxembourg. Armed forces in Europe. Brussels Treaty Protocol on Western European Union Forces. 132.
- Military aircraft. Brussels Treaty Protocol on Control of Armaments, 136; Annex, 140.
- Military clauses. Austrian State Treaty. 165.
- Military co-operation. Arab League Joint Defense and Economic Co-operation Treaty, 51, 52, 53; Greek-Turkish-Yugoslav Mutual Assistance Pact, 47, 48; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 195, 198.
- Military forces. *See* Armed forces.
- Military occupation. Allied High Commission Proclamation revoking Occupation Statute for Germany, 146; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 69; Protocol on Termination of Occupation Regime in Germany, 55.
- Mines. Brussels Treaty Protocol on Control of Armaments, 136, Annex, 139; prohibited: Austrian State Treaty, 166, Annex, 189; Brussels Treaty Protocol on Control of Armaments, 135, Annexes, 137, 138.
- Minorities. Rights of, Austrian State Treaty, 164; property, rights and interests, Austrian State Treaty, 183.
- Missiles, guided. Brussels Treaty Protocol on Control of Armaments, 136, Annex, 139; prohibited: Austrian State Treaty, 166, Annex, 188; Brussels Treaty Protocol on Control of Armaments, 135, Annexes, 137, 138.
- Mixed Board. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 74.
- Mixed Clemency Advisory Board. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 75.
- Mixed Committee. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 77.
- Most-favored-nation treatment. Austrian State Treaty, 185; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 107.
- Mutual assistance. Arab League Joint Defense and Economic Co-operation Treaty, 51; Greek-Turkish-Yugoslav Pact, 47; Warsaw Treaty, 194.
- National treatment. Austrian State Treaty, 185; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 107.
- Nationality. International Law Commission Report, 3, 13; draft conventions on elimination and reduction of future statelessness, 6; proposed articles on reduction of present statelessness, 15.
- Nazi organizations, dissolution of. Austrian State Treaty. 164.
- Nazi victims. Compensation to, Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 89; restitution of identifiable property to, Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 79.
- Netherlands. Armed forces in Europe. Brussels Treaty Protocol on Western European Union Forces. 132.
- Neutrality, permanent, of Austria. Austro-Soviet Memorandum, 1955. 191, 192.
- Non-discrimination. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 107, 111.
- North Atlantic Treaty. Protocol on Accession of German Federal Republic. 126.
- North Atlantic Treaty Organization. Co-operation with, Brussels Treaty Protocols, 129, 132, 133, 142; forces and depots, Brussels Treaty Protocol on Agency of Western European Union for Control of Armaments, 142, 143, 144.

- Nuclear fuel. Manufacture by Germany prohibited. Brussels Treaty Protocol on Control of Armaments, 135, Annexes, 137.
- Occupation Authorities, Germany. Rights and obligations created by. Convention on Settlement of Matters Arising out of the War and Occupation. 70.
- Occupation costs. Austro-Soviet Memorandum, April 15, 1955. 192.
- Occupation damages. Austrian State Treaty, 180; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 100.
- Offenses against peace and security of mankind. International Law Commission draft code. 19, 21; report, 17.
- Oil. Concessions, Austrian State Treaty, 169, 172, 173; deliveries, Austro-Soviet Memorandum, April 15, 1955, 193; enterprises, Austro-Soviet Memorandum, April 15, 1955, 193, State Treaty, 170, 175; refineries, Austrian State Treaty, 170, 174.
- Organization of American States, works of. Protocol to Universal Copyright Convention. 160.
- Organizations and enterprises. Tax exemptions. Agreement on Tax Treatment of Foreign Forces and Their Members in Germany. 125.
- Owner. Defined. Austrian State Treaty. 182.
- Passage, right of. International Law Commission draft articles on territorial sea. 36, 42.
- Peace and security of mankind, offenses against. International Law Commission draft code, 19, 21; report, 17.
- Peace Treaties, 1947. Recognition by Austria. State Treaty. 165.
- Permanent Council of Ministers. Greek-Turkish-Yugoslav Mutual Assistance Pact. 48.
- Permanent Military Commission. Arab League Joint Defense Treaty. 52; Annex, 53.
- Political Consultative Committee. Warsaw Treaty of Friendship, Co-operation and Mutual Assistance. 196.
- Ports. International Law Commission draft articles on territorial sea. 30.
- Portugal. German assets in. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 98.
- Prisoners of war, repatriation of. Austrian State Treaty. 168.
- Property, rights and interests. Austrian State Treaty, 181; in Germany: Arbitral Commission, Charter, 113, competence, powers, and applicable law, 94, 107, 116, procedure, 117; Austrian State Treaty, 179; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 79, 90, 101.
- Publication, definition of. Universal Copyright Convention. 152.
- Reciprocal treatment. Austrian State Treaty. 184.
- Refugees. Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 98; literary works of, Protocol to Universal Copyright Convention, 159.
- Reparations. Austrian State Treaty, 169; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 97.
- Restitution. Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 79, 90, 101, Charter of Supreme Restitution Court, 83; Austrian property: in Germany, Austrian State Treaty, 179, in territory of Allied and Associated Powers, Austrian State Treaty, 184; property, rights and interests of minority groups, Austrian State Treaty, 183; United Nations property: Austrian State Treaty, 181, Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 101.
- Roadsteads. International Law Commission draft articles on territorial sea. 30.
- Sea bed, jurisdiction over. International Law Commission draft articles on territorial sea. 27.
- Security measures of coastal states. International Law Commission draft articles on territorial sea. 37.

- Self-defense, collective. Arab League Joint Defense and Economic Co-operation Treaty, 51; Greek-Turkish-Yugoslav Mutual Assistance Pact, 47; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 196.
- Sovereignty over territorial sea. International Law Commission draft articles. 26.
- Spain. German assets in. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 98.
- Specialized Agencies, works of. Protocol to Universal Copyright Convention. 160.
- Stateless persons, works of. Protocol to Universal Copyright Convention, 159.
- Statelessness. International Law Commission report, 3, 13; draft conventions on elimination and reduction of, 6; proposed articles, 15.
- Straits. International Law Commission draft articles on territorial sea. 32, 42.
- Subsoil, jurisdiction over. International Law Commission draft articles on territorial sea. 27.
- Superior orders. International Law Commission draft code of offenses against peace and security. 20, 23.
- Supreme Restitution Court. Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 83; Charter of, 83; powers and jurisdiction of, 88.
- Sweden. German assets in. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 98.
- Switzerland. German assets in. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 98.
- Tax exemptions. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 103.
- Tax treatment of foreign forces and their members in Germany. Agreement on. 123.
- Territorial sea, regime of. International Law Commission report, 23; draft articles, 26.
- Terrorist acts. International Law Commission draft code of offenses against peace and security. 22.
- Transit, right of. Convention on Presence of Foreign Forces in Germany. 121.
- Transit facilities. Austrian State Treaty. 186.
- Translations, publication of. Universal Copyright Convention. 151.
- Treaties, rights and obligations under. Convention on Settlement of Matters Arising out of the War and Occupation of Germany. 71.
- Tripartite Agreement on Exercise of Retained Rights in Germany. 122.
- Union of Soviet Socialist Republics. Aircraft using German airspace, Convention on Settlement of Matters Arising out of the War and Occupation, 112; concessions to oil fields in Austria, Austrian State Treaty, 169, 172, Austro-Soviet Memorandum, April 15, 1955, 193; transfer of assets of Danube Shipping Company, Austrian State Treaty, 170, 175, Austro-Soviet Memorandum, April 15, 1955, 193; transfer of German assets in Austria, Annex II to Austrian State Treaty, 190.
- Union of Soviet Socialist Republics, United Kingdom, United States, France—Austria. State Treaty for Re-establishment of an Independent and Democratic Austria. 162.
- United Kingdom. Armed forces in Europe, Brussels Treaty Protocol on Western European Union Forces, 132, 133; armed forces in Germany, Convention on Presence of, 120.
- United Nations Charter. Rights and obligations under. Arab League Joint Defense and Economic Co-operation Treaty, 53; Greek-Turkish-Yugoslav Mutual Assistance Pact, 47, 49, 50; Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, 195, 196.
- United Nations International Law Commission. *See* International Law Commission.
- United Nations property. In Austria, Austrian State Treaty, 181, 185, 186; in Germany, Convention on Settlement of Matters Arising out of the War and Occupation, 101.
- United States. Armed forces in Germany, Convention on Presence of, 120; Executive Order on authority and functions in Germany, 147.

United States, United Kingdom, France—Federal Republic of Germany. Agreement on Tax Treatment of Forces and Their Members, 123; Convention on Presence of Foreign Forces in German Federal Republic, 120; Convention on Relations, 57; Convention on Settlement of Matters arising out of the War and the Occupation, 69; Protocol on Termination of Occupation Regime, 55.

Universal Copyright Convention, 1952. 149; Protocols, 159, 160, 161.

Vienna, Port of. Austrian State Treaty. 176.

War. Claims arising out of, Austrian State Treaty, 169, 180; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 99; laws of, International Law Commission draft code of offenses against peace and security, 22.

War criminals. Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 74; Executive Order on U. S. authority and functions in Germany, 148.

War damage, compensation for. Austrian State Treaty, 180, 182; Convention on Settlement of Matters Arising out of the War and Occupation of Germany, 102.

War graves and memorials. Austrian State Treaty. 168.

War matériel. Definition and list, Annex to Austrian State Treaty, 188; disposition of, Austrian State Treaty, 167.

Warsaw Treaty of Friendship, Co-operation and Mutual Assistance. 194.

Warships. Austrian State Treaty, Annex, 189; Brussels Treaty Protocol on Control of Armaments, 136, Annex, 140; manufacture by Germany prohibited, Brussels Treaty Protocol, 135, Annexes, 137, 139; right of passage, International Law Commission draft articles on territorial sea, 42.

Weapons, special. Prohibited. Austrian State Treaty. 166.

Western European Union. Agency for Control of Armaments, Brussels Treaty Protocol, 140; Council of, Brussels Treaty Protocols, 130, 133, 135, 141; Forces of, Brussels Treaty Protocol, 131.

World War II. Convention on Settlement of Matters Arising out of War and Occupation of Germany, 69; claims arising out of, Austrian State Treaty, 169, 180.

Yugoslavia. Austrian property, rights and interests in. Austrian State Treaty. 184.

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CONTENTS

1955

NUMBER 1, JANUARY, 1955

	PAGE
UNITED NATIONS. Report of the International Law Commission Covering the Work of Its Sixth Session, June 3-July 28, 1954	1

NUMBER 2, APRIL, 1955

GREECE-TURKEY-YUGOSLAVIA. Mutual Assistance Pact. <i>Bled, August 9, 1954</i> ..	47
ARAB LIGAE. Joint Defense and Economic Cooperation Treaty. <i>Cairo, April 18, 1950</i>	51

NUMBER 3, JULY, 1955

AGREEMENTS RELATING TO GERMANY, 1952 AND 1954:

Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany. <i>Paris, October 23, 1954</i>	55
Convention on Relations between the Three Powers and the Federal Republic of Germany. <i>Bonn, May 26, 1952, as amended at Paris, October 23, 1954</i>	57
Charter of the Arbitration Tribunal	62
Convention on the Settlement of Matters arising out of the War and the Occupation. <i>Bonn, May 26, 1952, as amended at Paris, October 23, 1954</i>	69
Charter of the Supreme Restitution Court	83
Charter of the Arbitral Commission on Property, Rights and Interests in Germany	113
Convention on the Presence of Foreign Forces in the Federal Republic of Germany. <i>Paris, October 23, 1954</i>	120
Tripartite Agreement on the Exercise of Retained Rights in Germany. <i>Paris, October 23, 1954</i>	122
Agreement on the Tax Treatment of the Forces and Their Members. <i>Bonn, May 26, 1952, as amended at Paris, October 23, 1954</i>	123
Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany. <i>Paris, October 23, 1954</i>	126
Protocol No. I Modifying and Completing the Brussels Treaty. <i>Paris, October 23, 1954</i>	128
Protocol No. II on Forces of Western European Union. <i>Paris, October 23, 1954</i> ..	131
Protocol No. III on the Control of Armaments, with Annexes. <i>Paris, October 23, 1954</i>	134
Protocol No. IV on the Agency of Western European Union for the Control of Armaments. <i>Paris, October 23, 1954</i>	140
ALLIED HIGH COMMISSION. Proclamation. <i>Bonn, May 5, 1955</i>	146
UNITED STATES. Executive Order No. 10608 on United States Authority and Functions in Germany. <i>May 5, 1955</i>	147

NUMBER 4, OCTOBER, 1955

	PAGE
UNIVERSAL COPYRIGHT CONVENTION. <i>Geneva, September 6, 1952</i>	143
U.S.S.R., UNITED KINGDOM, UNITED STATES, FRANCE-AUSTRIA. State Treaty for the Re-Establishment of an Independent and Democratic Austria. <i>Vienna, May 15, 1955</i>	162
ALBANIA, BULGARIA, CZECHOSLOVAKIA, GERMAN DEMOCRATIC REPUBLIC, HUNGARY, POLAND, RUMANIA, U.S.S.R. Treaty of Friendship, Cooperation and Mutual Assistance. <i>Warsaw, May 14, 1955</i>	194
INDEX	200